FILE COPY.

Supreme Court of the United States.

OCTOBER TERM, A. D. 1898.

No. 103.

SWIFT AND COMPANY, THE ARMOUR PACKING COMPANY, THE HAMMOND PACKING COMPANY, ARMOUR AND COMPANY, THE ARMOUR PACKING COMPANY, THE G. H. HAMMOND COMPANY, ARMOUR FERTILIZER AND SUPPLY WORKS, CORNELIUS, CONSTANTINE, ETC., AND NELSON MORRIS, EDWARD MORRIS AND HARRY H. MORRIS, CO-PARTNERS AS NELSON MORRIS AND COMPANY, J. OGDEN ARMOUR, PATRICK A. VALENTINE, CALVIN M. FAYERTE, ARTHUR MEEKER, THOMAS J. CONNING, CHARLES F. LAMBORN, RICHARD CUDAHY, EDWARD A. CUDAHY, PATRICK CUDAHY, ALBERT F. HORCHEIMER, LOUIS F. SWIFT, LAWRENCE A. CARTON, D. ADDISON HARTWELL, JOSEPH F. LOGAN, FRANK E. VOGEL, LOUIS PFAELZER, WILLIAM RITCHIE, ALBERT M. WHITE, HENRY JEFFRIS, EDWARD C. SWIFT, FERDINAND SOLBERGER, AND W. H. NOYES,

Appellants,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF AND ARGUMENT FOR APPELLANTS.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1904.

No. 188.

SWIFT AND COMPANY, THE CUDAHY PACKING COMPANY, THE HAMMOND PACKING COMPANY, ARMOUR AND COMPANY, THE ARMOUR PACKING COMPANY, THE G. H. HAMMOND COMPANY, SCHWARTZCHILD AND SULZBERGER COMPANY, CORPORATIONS, ETC., AND NELSON MORRIS, EDWARD MORRIS AND IRA N. MORRIS, COPARTNERS AS NELSON MORRIS AND COMPANY, J. OGDEN ARMOUR, PATRICK A. VALENTINE, CALVIN M. FAVORITE, ARTHUR MEEKER, THOMAS J. CONNERS, CHARLES F. LANGDON, MICHAEL CUDAHY, EDWARD A. CUDAHY, PATRICK CUDAHY, ALBERT F. BORCHERT, LOUIS F. SWIFT, LAWRENCE A. CARTON, D. EDWIN HARTWELL, JESSE P. LYMAN, FRANK E. VOGEL, LOUIS PFAELZER, WILLIAM RUSSELL, ALBERT H. VEEDER, HENRY VEEDER, EDWARD C. SWIFT, FERDINAND SULZBERGER AND W. H. NOYES,

Appellants,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF AND ARGUMENT FOR APPELLANTS.

On May 10, 1902, the United States filed its bill or petition against appellants under the act of Congress of July 2, 1890, entitled, "An Act to protect trade and commerce against unlawful restraints and monopolies."

The respective corporate defendants filed their joint

and several general and special demurrers to the bill and also to specific portions thereof. (Trans., 21-22.) The other defendants also filed their joint and several demurrers, which were similar in form, and general and special to the bill, and also to specific portions thereof (*id.*, 23-24).

Upon the hearing thereof, the Circuit Court, on April 4, 1903, overruled the demurrers (*id.*, 33-35) and rendered its opinion, in which that conclusion was reached (*id.*, 26-32).

The defendants elected to stand by their demurrers, and thereupon the court entered its final decree in favor of the Government and against the defendants (*id.*, 36-38). This appeal is prosecuted by defendants to review that ruling and decree.

The Petition or Bill of Complaint.

The petition or bill makes the appellants here defendants and alleges as follows (Trans., 3-10):

First: That said defendant corporations, partnership and persons, for many years last past have been and now are engaged in the business of buying live stock at divers points throughout the United States where stock yards and such like open and competitive markets for the sale of live stock exist—at Chicago, Illinois; Omaha, Nebraska; Sioux City, Iowa; St. Joseph and Kansas City, Missouri; East St. Louis, Illinois, and St. Paul, Minnesota, and slaughtering such live stock at extensive plants for that purpose maintained by certain of said defendants, respectively, to wit: the plants of Armour & Company at Chicago, East St. Louis, Kansas City, South Omaha and Sioux City; the plants of the Cudahy Packing Company at South Omaha, Kansas City and Sioux City, and at Cudahy, Wisconsin; the plants of the Hammond Packing Company at Chicago and Omaha and at Hammond, Indiana, and South St. Joseph, Missouri; the plants of Nelson Morris & Company at Chicago, East

St. Louis and South St. Joseph; the plants of the Schwartzchild & Sulzberger Company at Chicago and Kansas City, and the plants of Swift & Company at Chicago, East St. Louis, South St. Joseph, Kansas City, South Omaha and St. Paul, and at said several plants converting said live stock into fresh meat for human consumption.

Second: That defendants for many years last past have been and now are also engaged in the business of selling such fresh meats, at the several places where they are so prepared, to dealers and consumers in divers states and territories of the United States other than those wherein said meats are so prepared and sold as aforesaid, and in the District of Columbia and in foreign countries, and shipping the same meats, when so sold, from said places of their preparation, over the several lines of railroads, to such dealers and consumers, pursuant to such sales, and in so doing have been and are engaged in trade and commerce among the several states and territories of the United States, and District of Columbia, and with foreign nations.

Third: That defendants for many years have been and are also engaged in the business of shipping such fresh meats from said several points where the same are so prepared for consumption, over the several lines of common carriers, to their respective agents located at and near the principal markets for such meats in other states and territories than those wherein the said fresh meats are so prepared for consumption as aforesaid, and in the District of Columbia, and in foreign countries, for sale by those agents in those markets and in such other states and territories and the District of Columbia and in foreign countries, to dealers and consumers, and have been and are, through those agents, selling the same in those markets, and in so doing have been and are engaged in trade and commerce among the several states and territories, and the District of Columbia, and with foreign nations.

Fourth: That of the total volume of trade and commerce among said states and territories, and the District of Columbia, in fresh meats, the defendants together control about sixty per cent.,—having during 1901 purchased and slaughtered as aforesaid, and sold and shipped in the

form of fresh meats as aforesaid, 4,000,000 cattle, 5,000,000 sheep, and 6,000,000 hogs.

Fifth: That as to such trade and commerce among the several states and territories and District of Columbia and with foreign nations in fresh meats the defendants should, and but for the acts hereinafter complained of would, be and remain in free and unrestrained competition with each other.

Sixth: That defendants, in violation of the provisions of said act of congress of July 2, 1890, and in order to restrain competition among themselves (which would otherwise exist) as to the purchase of live stock necessary to the production of the meats produced by them, have engaged in and intend to continue an unlawful combination and conspiracy between themselves for directing and requiring their respective purchasing agents at the said several stock yards and open and competitive markets where they customarily purchase such live stock, to wit: Kansas City, St. Joseph, Omaha, Sioux City, St. Paul, East St. Louis and Chicago aforesaid (the same being live stock produced and owned principally in other states and territories of the United States, and shipped by the owners thereof to such stock yards and open markets for competitive sale to persons and corporations engaged in producing and dealing in fresh meats in the manner aforesaid), to refrain from bidding against each other, except perfunctorily and without good faith when making purchases of such live stock on behalf of defendants, respectively, and by this means inducing and compelling such owners of such live stock to part with the same at such stock yards and open markets at prices less than they would there receive if such bidding were really competitive as between the said purchasing agents of defendants; and defendants have caused and are causing their agents, respectively, to refrain from bidding accordingly, and have induced and are inducing each other, and will, unless restrained by this Honorable Court, continue in pursuance of such conspiracy, to induce each other to refrain from bidding as aforesaid; which combination and conspiracy is one in restraint of trade and commerce among the several states and territories and District of Columbia and with foreign countries.

Seventh: That defendants, in further violation of the provisions of said act of congress, and in order to further restrain competition among themselves, which would otherwise exist, as to the purchase of live stock necessary to the production of the meats produced by them, and to obtain for themselves and each other undue advantage over the owners and shippers thereof in the buying of the same at the said several stock yards and open markets, have engaged in and intend to continue an unlawful combination and conspiracy among themselves for bidding up, through their respective purchasing agents, the prices of live stock for a few days at a time at the said stock yards and open markets, so that the market reports will show prices much higher than the state of the trade will warrant, and thereby inducing owners of such live stock in divers other of said states and territories to simultaneously make large shipments of such live stock from such other states and territories to such stock yards and open markets, instead of shipping the same to more natural and advantageous markets and at more natural and advantageous times in the due and proper course of such trade and business, and by this means and by reason of the resulting large offerings there of such live stock (and by thereupon refraining from bidding against each other for the same), obtaining such live stock at prices much less than it would bring in the regular way of trade if such combination and conspiracy were not so engaged in and continued; and have been and are now from time to time, through their said agents so fraudulently bidding up the prices of such stock, and will, unless restrained by the court, continue to do so; which said combination and conspiracy last aforesaid is also one in restraint of trade and commerce among the several states and territories and the District of Columbia and with foreign countries.

Eighth: That defendants, in violation of the provisions of said act of congress, and in order to restrain and destroy competition among themselves as to such trade and commerce, and monopolize such trade and commerce, have engaged in and intend to continue an unlawful combination and conspiracy to arbitrarily from time to time raise, lower, and fix prices, and to maintain uniform prices at which they will sell, directly or through their respective

agents, such fresh meats to dealers and consumers throughout the said United States and territories and the District of Columbia and foreign countries; and that the arbitrary raising, lowering, fixing, and maintaining of such prices, in pursuance of the said combination and conspiracy, is being and is to be effected through the action of divers of their agents and attorneys to petitioner unknown, in secretly holding periodical meetings at some place or places to petitioner unknown, and there agreeing upon the prices to be adopted by the said defendants, respectively, in such trade and commerce, to be enforced by them until at a subsequent meeting the same may be changed; which said prices are notified by letters and telegrams in plain language and divers codes and ciphers; and they have been and are maintained by said defendants by adhering to the same in their sales made directly, and, among other ways, by collusively restricting and curtailing the quantities of such meats shipped by them in such trade and commerce to the markets aforesaid, whenever necessary or conducive to the maintaining of the prices so fixed; by imposing against each other divers penalties for any and all deviations by defendants or any of them from the prices so fixed; by establishing a uniform rule for the giving of credits to dealers throughout said states and territories and District of Columbia and foreign countries, and for the conduct of the business of such dealers, with penalties as between the defendants for violation thereof; by notifying each other of the delinquencies of said dealers, and keeping what is commonly known as a "black list" of such delinquents, and refusing to sell such meats to any of such delinquents; which said combination and conspiracy above set forth is one in restraint and monopoly of commerce among the several states and territories and District of Columbia and with foreign countries.

Ninth: And defendants, in violation of the provisions of said act of congress, have engaged in and intend to continue an unlawful combination and conspiracy to direct and require their respective agents at and near many of the markets for such fresh meats throughout said several states and territories and the District of Columbia, to arbitrarily make and impose uniform charges

for cartage for the delivery, upon making sales to dealers and consumers in those markets, of the meats shipped to them through said agents by the defendants, respectively, from their said several points of preparation of the same, when no such charges have been or are customary in such trade and commerce, or would be made but for said combination and conspiracy, thereby increasing the charges for such meats to said dealers and consumers in such markets and preventing the purchase of the same by those who are unable or unwilling to pay more than the price of the meats themselves without such additional charge; which said combination is also in restraint of such trade and commerce aforesaid.

Tenth: That, notwithstanding the common carriers by railroad, subject to the provisions of the laws of the United States for the regulation of commerce, have established and published, and do now and will establish and publish, respectively, their schedules of rates, fares, and charges for the transportation of live stock to the places of its conversion into such meats as aforesaid, and, for the transportation of such meats as aforesaid, and notwithstanding such rates were, and are, and will be the only lawful rates for the transportation of such articles as aforesaid, the defendants, intending thereby to monopolize and attempt to monopolize the commerce aforesaid and prevent competition therein, have all and each engaged in and will continue arrangements and agreements with divers officers and agents of such common carriers, whereby said defendants were to receive and have received and will continue to receive, by means of rebates and other devices, unlawful rates for such transportation, much less than the said lawful rates, and were to exclusively enjoy and share said unlawful advantage to the exclusion of competitors and would-be competitors and the general public, and have accordingly so enjoyed and shared them, and will, unless restrained by this Honorable Court, continue to do so; and by force of the consequent inability of competitors and would-be competitors to engage or continue in such commerce without ruinous loss have monopolized and are monopolizing and will continue to monopolize the said commerce, and have attempted and are attempting and will attempt to monopolize such commerce in live stock and fresh meats

among the states and territories and the District of Columbia and with foreign countries; which scheme to monopolize is also a combination and conspiracy in restraint of trade and commerce among the states and territories and the District of Columbia and with foreign countries.

Eleventh: That said defendants are now and for years past have been in combination and conspiracy with each other and with the railroad companies and others to complainant unknown, to obtain a monopoly of the supply and distribution of fresh meats throughout the United States and its territories and shipments thereof to foreign countries.

To that end the defendants do and will artificially restrain such commerce and put in force abnormal, unreasonable, and arbitrary regulations for the conduct of their own and each other's business, affecting the same from the shipment of the live stock from the plains to the final distribution of the meats to the consumer, all to the manifest injury of the people of the United States and in defiance of law.

The bill of complaint prays that the court forthwith grant a writ of injunction directed to said defendants, their agents, attorneys, etc., enjoining them and each of them, from continuing each and any of the unlawful proceedings aforesaid, and from attempting to monopolize, in the manner aforesaid or in any other manner, and by any other means and devices, the commerce aforesaid, or any part thereof, or any part of the trade or commerce among the states and territories, and District of Columbia, and with foreign nations, and especially from refraining and instructing their respective purchasing agents to refrain from bidding against each other except perfunctorily and without good faith in making purchases of live stock, and from inducing each other to so refrain, and from engaging in any combination, conspiracy, understanding, or arrangement for the purpose of bringing about such refraining from competitive bidding, and from bidding up the prices of live stock at the stock yards and open markets higher than the state of the trade will warrant, and from arbitrarily raising, lowering, fixing, and maintaining prices of their and each other's products, and from maintaining prices so fixed and uniform prices by adhering to the same in their sales, or

by restricting the quantities of meats shipped, or by imposing penalties upon themselves and each other, or by making uniform rules for credit to dealers, or by making and keeping what is commonly known as a "black list" of delinquent dealers, or by refusing to sell meats to such delinquents, or by any other method or device; and from agreeing with each other and acting in concert, with a view to fixing prices or terms for the sale or delivery of said meat products so sold, in such manner as to prevent free competition in, and restrain or monopolize, such commerce; and from imposing a charge for cartage for the delivery of their products upon making sales to dealers and consumers; and from asking and receiving, by means of rebates or otherwise, from railroad companies, less than the established and published rates for the transportation of their live stock and meat products; and that upon such final hearing to make such injunction perpetual.

The bill further prays discovery of the books, papers, accounts, letters, telegrams, records and documents whatsoever of the defendants relating in any manner, directly or indirectly, to the purchase or shipment of live stock by them or their agents, or to the sale or shipment or delivery of fresh meats by them or their agents; and for other and general relief; and for the issue of subpœna to defendants, requiring them and each of them, under a penalty and at a time and place to be therein stated, to appear and answer under oath all and singular the matters therein stated and charged, etc.

Thereupon, on May 20, 1902, the Circuit Court granted a temporary injunction. (Trans., 14-18.)

The Demurrers of the Defendants.

The demurrers are as follows:

That said complainant hath not, by said bill, stated such a case as entitles them to any such discovery or relief as is prayed for against defendants, or any of them.

That the bill is multifarious; and is for several and distinct matters and causes, in many or some of which the respective defendants, or some of them, are not interested or concerned; and is for several and distinct and

independent matters and causes, which have no relation to each other and which cannot be embraced in one suit.

To so much of said bill as seeks discovery of the books, papers, accounts, letters, telegrams, records and documents of these respective defendants, defendants severally demur, and for cause show that complainant hath not stated such a case as entitles them to any such discovery.

To so much of the bill as seeks that the respective defendants answer or make discovery, of or as to any matter therein alleged, defendants respectively demur, and for cause thereof show that complainant hath not made or stated such as entitles them to any such discovery.

To each of the following parts of the bill, separately, the said defendants in like manner demur, viz.: Such parts as are respectively alleged or contained in the third, sixth, seventh, eighth, ninth, tenth, and eleventh paragraphs or divisions of said bill, respectively, and as seek that these respective defendants may answer or make discovery with respect to the matter therein respectively alleged, and as seeks any relief with respect thereto from or against these respective defendants, or any or either of them; and as to each of said respective parts so demurred to, for causes of demurrer show that complainant hath not by the said part of said bill so demurred to stated such a case as entitles them to any such discovery or relief as is thereby sought against defendants or any or either of them. Also, that said part of said bill so demurred to is multifarious, and is for several and distinct matters and causes which have no relation to each other and in some of which these respective defendants or some of them are not interested or concerned. (*id.*, 21-24.)

Upon the hearing of the respective demurrers, the Circuit Court on April 4, 1903, entered its order overruling the demurrers (*id.*, 33-35); and rendered its opinion, in which that conclusion was reached (*id.*, 26-32).

Final Decree.

This cause coming on to be heard upon the demurrers of defendants, and the court, being advised, overruled the same, and ordered defendants to answer, and defendants having elected to stand by their demurrers and failed to answer, their default was entered.

On motion of the United States attorney, the court doth order that the preliminary injunction theretofore awarded, restraining the defendants and each of them, their respective agents and attorneys, and all other persons acting in their behalf or in behalf of either of them, or claiming so to act, from entering into, taking part in or performing any contract, combination or conspiracy, the purpose or effect of which will be, as to trade and commerce in fresh meats between the several states and territories and the District of Columbia, a restraint of trade in violation of said act of Congress of July 2, 1890, either by directing or requiring their respective agents to refrain from bidding against each other in the purchase of live stock; or collusively and by agreement to refrain from bidding against each other at the sales of live stock; or by combination, conspiracy or contract raising or lowering prices or fixing uniform prices at which the said meats will be sold, either directly or through their respective agents; or by curtailing the quantity of such meats shipped to such markets and agents; or by establishing and maintaining rules for the giving of credit to dealers in such meats, the effect of which rules will be to restrict competition; or by imposing uniform charges for cartage and delivery of such meats to dealers and consumers, the effect of which will be to restrict competition; or by any other method or device, the purpose and effect of which is to restrain commerce as aforesaid; and also from violating the provisions of said act of Congress by combining or conspiring together, or with each other and others, to monopolize or attempt to monopolize any part of the trade and commerce in fresh meats among the several states and territories and the District of Columbia, by demanding, obtaining, or with or without the connivance of the officers or agents thereof, or of any of them, receiving from railroad companies or other

common carriers transporting such fresh meats in such trade and commerce, either directly or by means of rebates, or by any other device, transportation of or for such meats from the points of the preparation and production of the same from live stock or elsewhere, to the markets for the sale of the same to dealers and consumers in other states and territories than those wherein the same are so prepared, or the District of Columbia, at less than the regular rates which may be established or in force on their several lines of transportation, under the provisions in that behalf of the laws of the United States for the regulation of commerce,—be and the same is hereby made perpetual.

But nothing herein shall be construed to prohibit the said defendants from agreeing upon charges for cartage and delivery, and other incidents connected with local sales, where such charges are not calculated to have any effect upon competition in the sales and delivery of meats; nor from establishing and maintaining rules for the giving of credit to dealers where such rules in good faith are calculated solely to protect the defendants against dishonest or irresponsible dealers, nor from curtailing the quantity of meats shipped to a given market where the purpose of such arrangement in good faith is to prevent the over accumulation of meats as perishable articles in such markets.

Nor shall anything herein contained be construed to restrain or interfere with the action of any single company or firm, by its or their officers or agents (whether such officers or agents are themselves personally made parties defendant hereto or not), acting with respect to its or their own corporate or firm business, property or affairs. (*id.*, 37-38.)

The defendants thereupon prayed and perfected this appeal; and a specification of the errors assigned is as follows:

Specification of Errors.

1. The Circuit Court erred in overruling and in not sustaining the demurrers (Trans., 42).

2. In not holding and ruling that the bill does not allege any contract, combination, or conspiracy in restraint of interstate or foreign commerce, within the meaning of the said act of congress, and in not sustaining the demurrers on that ground (*ibid.*).

3. In not holding and ruling that said bill does not allege any acts of defendants monopolizing or attempting to monopolize, or combining or conspiring to monopolize any part of said trade or commerce within the meaning of said act, and in not sustaining said respective demurrers on that ground (*ibid.*).

4. In not holding and ruling that if said act of July 2, 1890, is to be given the construction which would make said supposed acts of defendants in said bill alleged, a violation thereof, for which defendants would be subject to the penalties, injunctions or processes by said act prescribed, said act violates the provisions of the Constitution (*ibid.*).

5. In not holding and ruling that there is in said bill a misjoinder of causes of action and of persons, as alleged in said demurrer, and in not sustaining the said demurrers on that ground (*ibid.*).

6. In not holding and ruling that said bill and the allegations and charges therein are not sufficiently definite or specific, but are too general and indefinite to call for or require any answer from defendants, and in not sustaining the said demurrers on that ground (*ibid.*).

7. The Circuit Court did not have jurisdiction to enter the said decree nor to award said injunction against defendants (*ibid.*).

8. The Circuit Court erred in not holding and ruling that said bill was multifarious, and in not sustaining the demurrers upon that ground (*ibid.*).

9. In not holding and ruling that said bill was for several and distinct matters and causes, in many or some of which these respective defendants, or some of them, are not interested or concerned; and in not sustaining the demurrers thereto upon that ground (*ibid.*).

10. In not holding and ruling that the respective matters and causes in the sixth paragraph of said bill, and the matters and causes in the seventh, eighth, ninth, tenth and eleventh paragraphs of said bill, respectively, were distinct and different and independent and unconnected matters and causes, and not the same matters or causes, and that the same were improperly joined in said bill, and in not sustaining the demurrers on that ground (*id.*, 42-43).

11. In not holding that the supposed unlawful combination and conspiracy between the defendants for directing and requiring their respective purchasing agents at the several stock yards and markets to refrain from bidding against each other except perfunctorily and without good faith, in said sixth paragraph of said bill charged, and the supposed unlawful combination and conspiracy among themselves for bidding up, through their respective purchasing agents, the prices of live stock, in said seventh paragraph charged, and the said supposed unlawful combination and conspiracy to raise, lower and fix prices and to maintain uniform prices at which they will sell fresh meats, in said eighth paragraph charged, and the supposed unlawful combination and conspiracy to direct and require their respective agents at and near many of the markets for such fresh meats throughout the said states and territories and the District of Columbia to arbitrarily make and impose uniform charges for cartage, in said ninth paragraph charged, and the supposed engaging in and continuing of agreements with divers agents of common carriers, in said tenth paragraph charged, and the supposed combination and conspiracy of said defendants with each other and with the railroad companies and others to complainant unknown, to obtain a monopoly of the supply and distribution of fresh meats, in said eleventh paragraph of said bill charged,—are, respectively, distinct and different and unconnected and independent supposed combinations, conspiracies, matters and causes, and that the same are improperly joined in said bill, and in not sustaining said respective demurrers on that ground (*id.*, 43-44).

12. In not sustaining said respective demurrers to so much of said bill or petition as seeks discovery of the

books, papers, accounts, letters, telegrams, records, and documents of said respective defendants, and in overruling said respective demurrers; and in not holding and ruling that the petition seeking discovery as aforesaid, does not contain any showing of probable cause supported by oath or affirmation as required by the fourth amendment to the Constitution, or otherwise comply with said fourth amendment, but violates the provisions of the fourth and fifth amendments to the Constitution (*id.*, 44).

13. In not sustaining said respective demurrers to so much of the bill as seeks that these respective defendants may answer or make any discovery of or as to any matter or cause of complaint therein alleged, and in overruling the same; and in not holding and ruling that said petition seeking answer or discovery as aforesaid, does not contain any showing of probable cause supported by oath or affirmation as required by the fourth amendment to the Constitution, or otherwise comply with said fourth amendment, but violates the provisions of the fourth and fifth amendments to the Constitution (*ibid.*)

14. In not sustaining the respective demurrers to so much of said bill as is contained in the sixth paragraph thereof; and in not ruling that said paragraph sixth does not allege acts or facts to constitute the violation of said act of congress, but is too general and indefinite to require answering; and in not ruling that said sixth paragraph does not allege any contract, combination or conspiracy of defendants in restraint of interstate or foreign commerce within the meaning of said act, and does not allege any monopolizing or attempt to monopolize or any combination or conspiring to monopolize any part of interstate or foreign trade or commerce by defendants, within the meaning of said act; and in not ruling that the supposed contracts or acts alleged in said sixth paragraph are not any part of and do not regulate or affect interstate or foreign trade or commerce (*id.*, 44-45).

15. In not sustaining and in overruling the demurrers to so much of said bill as is contained in the seventh paragraph; and in not ruling that said seventh paragraph does not allege any acts or facts to constitute the violation of said act of congress, but is too general and indefinite to require answering; and in not ruling that said

seventh paragraph does not allege any contract, combination or conspiracy of defendants in restraint of interstate or foreign commerce within the meaning of said act, and does not allege any monopolizing or attempt to monopolize, or any combination or conspiring to monoplize any part of interstate or foreign trade or commerce by defendants, within the meaning of said act; and in not ruling that the supposed contracts or acts alleged in said seventh paragraph are not any part of and do not regulate or affect interstate or foreign commerce (*id.*, 45-46).

16. A specification of error with respect to so much of said bill as is contained in the eighth paragraph, similar to the fourteenth and fifteenth specifications, *supra* (*id.*, 46-47).

17. A specification of error with respect to so much of said bill as is contained in the ninth paragraph, similar to the fourteenth and fifteenth specifications, *supra* (*id.*, 47-48).

18. A specification of error with respect to so much of said bill as is contained in the tenth paragraph, similar to the fourteenth and fifteenth specifications, *supra*. Also, that the court erred in not ruling that the supposed acts alleged in said tenth paragraph are not each the acts of all of said defendants, but are alleged acts of one or more defendants acting separately, each for itself or himself, and that said tenth clause and the bill in those allegations is multifarious, and that there is therein a misjoinder of the alleged causes of action in that behalf; and the court erred in not ruling that the supposed acts of defendants in said tenth clause are not forbidden by the act in question or by any other law, and that either of the defendants acting separately with respect to his or its own business is not, and within the Constitution could not be, forbidden from agreeing for or respecting the rates of transportation therein referred to (*id.*, 48-49).

19. A specification of error with respect to so much of said bill as is contained in the eleventh paragraph, similar to the fourteenth and fifteenth specifications, *supra* (*id.*, 49-50).

20, 21. The court erred in entering its decree in favor of complainant, and in awarding any injunction thereon against defendants, and in decreeing that said injunction be made permanent, and in not dismissing the bill (*id.*, 50).

BRIEF.

I.

1. The charges in each of the paragraphs or counts of the bill or petition of alleged violations of the Sherman Act (Trans., 5-9) are, respectively, mere statements of legal conclusions. Each is bad on demurrer for that reason.

These charges would be bad on that ground, even in an indictment under this act. *In re* Greene, 52 Fed. R., 104, 111-12, 115-16; *United States* v. *Cruikshank*, 92 U. S., 542, 563; *same* v. *Simmons*, 96 *id.*, 360; *same* v. *Carll*, 105 *id.*, 611; *same* v. *Britton*, 107 *id.*, 655.

And *a fortiori* are they bad in a bill or petition in equity, which is required to state the facts essential to the cause of action. *Lawson* v. *Hewell*, 118 Cal., 613; *Wright* v. *Dame*, 22 Pick., 59; *Ambler* v. *Choteau* 107 U. S., 586, 591; *Van Weel* v. *Winston*, 115 U. S., 228, 237-38; 1 Foster Fed. Prac., Sec. 67.

The *facts* alleged are looked at and not adjectives or adverbs or epithets. *Magniac* v. *Thompson*, 2 Wall., Jr., 209 (per Grier, Cir. Justice); *Price* v. *Coleman*, 21 Fed. R., 357 (per Gray, Cir. Justice); *Van Weel* v. *Winston, ut sup.; Ambler* v. *Choteau, ut sup.*

The importance of applying this rule with strictness here is more marked because answer by the defendants under oath is called for.

This point is properly raised by demurrer. 1 Daniel Ch. Pr., 372. It was so raised in *Van Weel* v. *Winston, supra.*

2. The decree complained of, which is merely ore of

injunction, is erroneous on like grounds of indefiniteness. *Laurie* v. *Laurie,* 9 Paige, 234, 235; *Robinson* v. *Clapp,* 65 Conn., 365; *Whipple* v. *Hutchinson,* 4 Batchf., 190.

It makes clear the misconception of the Sherman Act and of Federal power to regulate commerce upon which the bill and decree proceed. They appear to go upon the theory that under the act of Congress the Federal courts are to regulate commerce, and the decree enjoins, not specific acts, but violations of the statute in terms as general as the act of Congress itself. A defendant cannot know from its terms what he may or may not do without making himself liable as in contempt.

This makes the insufficiency of the bill more obvious, as no valid decree could have been entered upon its allegations.

3. The provisions of the Sherman Act do not contemplate such a general proceeding or decree to interfere in advance with future dealings, as interstate commerce, which may be interstate trade or may be domestic trade according to the future and changeable intention of the dealers. *United States* v. *E. C. Knight Co.,* 156 U. S., 1, 15.

II.

The business of defendants of purchasing live stock and of selling fresh meats produced therefrom, as described in the bill (Trans., 4-5), is not, upon the allegations of fact in the bill, interstate or foreign commerce.

1. The purchase of cattle as alleged and described in the first paragraph of the bill (*id.*, 4-5) is not alleged or shown to be interstate commerce.

2. The business of defendants of selling such fresh meats, at the several places where they are so prepared, as described in the second paragraph (*id.*, 5), is not, under the facts there alleged, interstate trade or commerce. The sales and deliveries, although to dealers in other States and Territories, are there alleged to be made at the places where the meats are prepared by defendants, and are domestic sales.

The deliveries by defendants to the carriers, who are agents of the purchasers in that respect, under the allegations of the bill, are deliveries to the purchasers in the State where the sale is made; and the sales and deliveries are there fully completed. *Merchant* v. *Chapman*, 4 Allen, 362; *Orcutt* v. *Nelson*, 1 Gray, 543; *Waldron* v. *Romaine*, 22 N. Y., 368; *Ramsey & Gore Co.* v. *Kelsea*, 55 N. J. L., 320; *Cotte* v. *Harden*, 4 East., 211; *Brown* v. *Hodgson*, 2 Camp., 86; *Groning* v. *Needham*, 5 Maule & S., 189; 2 Kent Com., 499; *Crossman* v. *Lurman*, 192 U. S., 189, 198-200.

The sellers' act in delivering the merchandise to the common carrier, or carrying the merchandise to the carrier's depot (if that is taken to be in effect alleged), is

not any part of the interstate transportation, and does not make the goods the subject of interstate commerce. *Coe* v. *Errol*, 116 U. S., 517, 528.

The fact that the sale is made with a view to the goods being transported by the buyer's agent to another State after the sale and delivery is fully completed, does not make the sale interstate commerce. *Kidd* v. *Pearson*, 128 U. S., 1, 23-24; *United States* v. *E. C. Knight Co.*, 156 U. S., 1, 13-17.

3. The sales alleged in the third paragraph of the bill, by agents of the owners in other States and Territories to whom the owners of the fresh meats have shipped the same for sale there by such agents on the ground (*id.*, 5), are not interstate commerce. *Coe* v. *Errol*, 116 U. S., 517, 525, 526; *Kidd* v. *Pearson*, 128 U. S., 1, 23-24; *United States* v. *Knight Co.*, 156 U. S., 1, 13-17; *Austin* v. *Tennessee*, 179 U. S., 343; *Crossman* v. *Lurman*, 192 U. S., 189, 198-200; *Am. Harrow Co.* v. *Shaffer*, 68 Fed., 750; *Stevens* v. *Ohio*, 93 Fed., 793.

Under the allegations here in question, it is to be taken that the meats, before the sales here referred to are made, have come to their place of rest and are at rest for an indefinite time awaiting sale at their place of destination, and are a commodity in the market where the sales are made; and that the sales are not in the "original packages"; and that the meats, at the time of the sales, have become a part of the general property in the State where sold, and are there handled and sold as such. *Southern Coal Co.* v. *Bates*, 156 U. S., 577, 588-89; *Brown* v. *Houston*, 114 U. S., 623, 632-33; *Emert* v. *Missouri*, 156 U. S., 296, 310; *Singer Mfg. Co.* v. *Wright*, 97 Ga., 123.

4. The point here made is entirely consistent with the rulings in many cases, that the owner of merchandise, who transports it from one State to another for sale, has a right (which cannot be interfered with by state or municipal laws) to sell it as an article of interstate commerce. He also has a right to make such article part of the general property of the State into which it is taken, and he then has the right to sell and others have the right to purchase it as an article of domestic commerce, which cannot be interfered with by federal law. The Sherman Act does not seek to and could not interfere with that right. *United States* v. *E. C. Knight Co.*, 156 U. S., 15, and *Kidd* v. *Pearson* and *Veazie* v. *Moor*, there cited. But this bill here does seek to interfere with that right.

Again, the point here made is not touched by the line of decisions holding that state or municipal laws are invalid, which, by taxation or other regulations, discriminate against merchandise brought from another State, or seek to prevent interstate commerce therein,—such as *Welton* v. *Missouri*, 91 U. S., 465; *Walling* v. *Michigan*, 116 U. S., 446; *Minnesota* v. *Barber*, 136 U. S., 313; *Brimmer* v. *Rebman*, 138 U. S., 78, and *Schollenberger* v. *Penna.*, 171 U. S., 1, 24-25.

III.

The bill of complaint does not show any contract, combination or conspiracy in restraint of interstate trade or commerce within the meaning of the Sherman Act.

It does not allege any acts of defendants monopolizing or attempting to monopolize or combining or conspiring to monopolize such trade or commerce.

If the act in question be given a construction which would sustain this bill of complaint, the statute would be unconstitutional.

The alleged offenses complained of are set forth in the sixth, seventh, eighth, ninth, tenth and eleventh paragraphs of the bill.

1. *As to the sixth and seventh paragraphs* (Trans., 5-7) we maintain:

(a) The allegations of combination and conspiracy here are of mere legal conclusions. (See *supra*, p. 17, Point I.)

(b) That the purchases of live stock referred to in the sixth and seventh paragraphs, as therein alleged, are not interstate commerce.

> The first paragraph of the bill in which the business of purchasing live stock for slaughter is set forth and described, does not allege or show that the business is interstate commerce (Trans., 4; *supra*, Point II., p. 19).
>
> The description of the live stock in the sixth paragraph, as live stock produced and owned principally in other States and Territories, and shipped by the owners to the places where sold, for sale to persons engaged in producing and dealing in fresh meats, does not show that the sales of the live

stock are interstate commerce. The live stock, when offered for sale in the pens of the stock yards, are, under the allegations of fact in the bill, to be considered as having become part of the general mass of property of the State where offered for sale. The defendants purchasing the live stock have the right so to treat and deal therewith. *Brown* v. *Houston*, 114 U. S., 622, 632-33; *Pittsburgh Coal Co.* v. *Bates*, 156 U. S., 577, 588-89; *Emert* v. *Missouri*, 120 U. S., 489, 497; *Diamond Match Co.* v. *Ontonagon*, 188 U. S., 82, 92-97. When purchased, the live stock is, under the allegations of this bill, at rest for an indefinite time, awaiting sale at its place of destination (188 U. S., 95-96).

The defendants have as much right, then, to treat and deal with and purchase such live stock as an article of domestic commerce as the State has so to treat it for the purposes of taxation or regulation. This bill seeks to interfere with that right under the Sherman Act.

If the sworn allegations of the bill in this respect were to be supplemented by other facts, as matters of common knowledge, with respect to the situation of the live stock when sold, such as appeared in the *Hopkins* and *Anderson cases*, the case of the Government would be no better. It would then appear that the cattle and other live stock are shipped to commission merchants at the stock yards; are then placed in the pens of the stock yards companies, and there held, cared for and fed by the stock yards company for the account of the commission merchants, and under the allegations here it must be taken that their bulk is broken up; they are divided into lots and sold and delivered by the commission merchant as the principal or owner thereof, and so are not purchased as articles of interstate commerce.

(c) But if these purchases of live stock are interstate commerce, the acts alleged in the sixth and seventh paragraphs are not violations of the Sherman Act. *Hopkins* v. *United States*, 171 U. S., 591; *Anderson* v.

Same, 171 U. S., 604. They are the exercise of a constitutional right of defendants to control their own business.

There is nothing in the bill to show the proportion of the entire number of head of live stock offered for sale at the markets in question, which is bought by the defendants for the purposes of the production of fresh meat; and so there is nothing to show anything like monopoly or attempt at monopoly of the live stock purchases by the defendants.

There is nothing in the bill to show any attempt on the part of the defendants to control or affect the purchases or business in the purchases of live stock of any other persons than themselves. The alleged combinations by defendants in the sixth and seventh paragraphs charged have to do merely with their own business conduct in themselves buying live stock, or determining how much they shall buy, at private sale for consumption in their own private business.

The combination charged in the sixth paragraph, for directing their respective purchasing agents "to refrain from bidding against each other, except perfunctorily, and without good faith," does not allege a combination to restrain trade; or even a combination to refrain from bidding. A perfunctory bid, made without good faith, is one which the seller could accept and enforce.

The alleged combination in the seventh paragraph, "for bidding up, through their respective purchasing agents, the prices of live stock for a few days at a time at the said stock yards and open markets," does not charge a combination to restrain trade.

These alleged combinations do not have the direct and immediate effect of restraining interstate commerce, but their effect, if any, upon interstate trade in live stock is indirect and incidental, within the meaning of the decisions of this court. The effect is not near so direct or immediate as the mutual agreement of the traders who were members of the Traders' Exchange in the *Anderson case.*

Obviously the supply of live stock for fresh meat greatly varies in the market at different seasons and times, while the demand for fresh meats for human consumption, for which defendants purchase such live stock, is comparatively constant and uniform.

It is a public benefit and not a public evil that defendants at all times be able to supply such constant demand for their fresh meats, and that at the same time they should not overstock the market with their perishable meats. This makes it proper that they should act with some concert and common understanding in their purchases of live stock for that purpose.

2. *As to the eighth paragraph* (Trans., 7) we contend:

(a) The allegation of combination and conspiracy is of a mere legal conclusion, and insufficient.

(b) The sales of fresh meats by agents of defendants, as there described, under the facts alleged, are not interstate commerce.

(c) But if it be interstate commerce, no violation of the Sherman Act is thereby shown.

No criminal conspiracy is alleged. The charge there is not of a combination or conspiracy to restrain trade (which the statute forbids), but is of a combination or conspiracy to do a lawful act, the exercise of a constitutional right, viz.: to raise, lower, fix and maintain their own prices, for their own property, in private sales, thereof by themselves. The doing that is not prohibited or made criminal by the act of congress.

A criminal conspiracy is an agreement of two or more, either to do an act criminal or unlawful in itself, or to

do a lawful act by means which are criminal or unlawful. *Pettibone* v. *United States,* 148 U. S., 203; *Comm.* v. *Shedd,* 7 Cush., 514. Here neither the act nor the means alleged are criminal or unlawful. The allegation of intent is immaterial. *Stevenson* v. *Newham,* 13 C. B., 285; *Allen* v. *Flood,* App. Cas., 1.

Again, this point is settled by the ruling in the *Knight case* (156 U. S., p. 16), that the restraint of trade, if any, which a combination by defendants to raise or lower their own prices would tend to effect "would be an indirect result, * * * and such result would not necessarily determine the object of the contract, combination or conspiracy."

3. *As to the ninth paragraph* (Trans., 7-8) we contend:

(a) The allegation is of a conclusion of law.

(b) The cartage as there described is not, under the allegations of the bill, interstate commerce. *State* v. *Knight,* 192 U. S., 21; *Detroit Etc. Ry.* v. *Interstate Commerce Com.,* 74 Fed. R., 803, 808-9, 911; *Hopkins* v. *United States,* 171 U. S., 578, 592-97.

(c) The charge is not of a conspiracy either to a criminal or unlawful act, or to do by unlawful means the lawful act of fixing their own charges for cartage.

(d) Nothing here charged has the direct, immediate or necessary effect to restrain interstate commerce.

4. *As to the tenth paragraph* (Trans., 8) we maintain:

(a) The allegation is of a legal conclusion. It also is too indefinite and general. Sufficient facts are not alleged. *United States* v. *Hanley,* 71 Fed., 672.

(b) There was no jurisdiction herein of this charge. No common contract, combination or conspiracy of the defendants with each other is alleged. The allegation that "all and each" have made agreements for less than lawful transportation rates is that they did so acting separately. That was not unlawful on the part of our defendant; much less was it any violation of the Sherman Anti-Trust Act.

(c) There is here no sufficient showing of an attempt to monopolize either the interstate transportation of live stock or fresh meats or interstate trade in live stock or fresh meats.

(d) This paragraph is multifarious, and there is therein a misjoinder of causes and parties.

5. *As to the eleventh paragraph* (Trans., 8-9) we submit that it is too general and insufficient to require argument. It is disposed by what is urged as to previous paragraphs.

IV.

Prior rulings by this court in cases arising under the Sherman Act do not sustain the Government's case here.

V.

With respect to the supposed limitations of the Sherman Act upon the right of private contract, that act is to be interpreted in the light of the principles of the common law. *United States* v. *Wong Kim Ark*, 169 U. S., 649; *Moore* v. *United States*, 91 *id.*, 270 274; *Minor* v. *Happersett*, 21 Wall., 162; *Ex parte Wilson*, 114 U. S., 417, 422; *Boyd* v. *United States*, 116 *id.*, 616, 624, 625; *Smith* v. *Alabama*, 124 *id.*, 465.

VI.

The bill of complaint is multifarious; and there is therein a misjoinder of causes and of parties. *Walker* v. *Powers,* 104 U. S., 251; *Brown* v. *Guarantee Trust Co.,* 128 *id.,* 403; *Zeigler* v. *Lake St. Ry.,* 76 Fed. Rep., 662; *Eastern Bldg. Assn.* v. *Denton,* 65 *id.,* 569.

VII.

The bill is too general and indefinite to require answer. It does not sufficiently set forth definite or specific facts.

VIII.

The demurrers to so much of the bill as prays for answer under oath, and to so much thereof as prays discovery of defendants' books, papers, etc., are well taken.

Rights protected by the fourth and fifth amendments are thereby infringed. *United States* v. *Saline Bank,* 1 Pet., 100; *Boyd* v. *United States,* 116 U. S., 616; *Counselman* v. *Hitchcock,* 142 *id.,* 547; *Livingston* v. *Tompkins,* 4 Johns. Ch., 415, 432; *Entick* v. *Carrington,* 19 Howell's St. Tr., 1029; S. C., 2 Wils., 275; *Huckle* v. Money, 2 Wils., 206; Mitford & Tyler's Eq. Pldg., 289.

ARGUMENT.

I.

THE CHARGES IN THE SIXTH, SEVENTH, EIGHTH, NINTH, TENTH, AND ELEVENTH COUNTS FOR PARAGRAPHS OF THE BILL OR PETITION ARE MERELY STATEMENTS OF LEGAL CONCLUSIONS, AND NOT FACTS. THEY ARE BAD ON DEMURRER FOR THAT REASON.

The allegations are as follows:

In the sixth paragraph or count, that the defendants, "in violation of the provisions of an act of Congress," etc., "have engaged in and intend to continue an unlawful combination and conspiracy between themselves for directing and requiring their respective purchasing agents, * * * to refrain from bidding against each other, except perfunctorily and without good faith, etc. (Trans., 5, 6.)

In the seventh paragraph, that defendants, "in further violation," etc., "have engaged in and intend to continue an unlawful combination and conspiracy among themselves for bidding up, through their respective purchasing agents, the prices of live stock," etc. (*Id.*, 6.)

In the eighth paragraph, that defendants, "in violation," etc., "have engaged in and intend to continue an unlawful combination and conspiracy to arbitrarily from time to time, raise, lower and fix prices and maintain uniform prices at which they will sell, directly or through their respective agents, such fresh meats," etc. (*Id.*, 7.)

And so in the other paragraphs, above mentioned, the allegation is of a mere legal conclusion. (*Id.*, 7, 8, 9.)

This vice is found in every paragraph or count charging an alleged violation of the Act.

Such pleading is insufficient in any pleading charging the commission of a wrong. It is bad even in an indictment under this act. *In re Greene*, 52 Fed. Rep., 104, 111-12, 115-16; *United States* v. *Cruikshank*, 92 U. S., 542; *Same* v. *Simmons*, 96 *id.*, 360; *Same* v. *Carll*, 105 *id.*, 611; *Same* v. *Britton*, 107 *id.*, 655. Or, in a declaration of law. *Hazard* v. *Griswold*, 21 Fed., 178, per GRAY, Circuit Justice. And, *a fortiori*, is it bad in a bill or petition in equity. *Magniac* v. *Thornton*, 2 Wall. Jr., 209; *Van Weel* v. *Winston*, 115 U. S., 237-38; *Moore* v. *Green*, 19 How., 69; 1 Dan. Chan. Pldg. & Prac., 324.

And where, as here, an answer under oath is required, the need of requiring the bill to set forth the specific acts and facts which call for the relief, is more obvious.

In the *Greene case*, 52 Fed. Rep., 104, Mr. Justice JACKSON (then Circuit Judge), said, respecting the charge of violating the Sherman Act in question:

> "We regard it as well settled by the authorities that an indictment, following simply the language of the act, would be wholly insufficient, for the reason that the words of the statute do not, of themselves, fully, directly and clearly set forth all the elements necessary to constitute the offense intended to be punished. *United States* v. *Cruikshank*, 92 U. S., 542; *United States* v. *Simmons*, 96 U. S., 360; *United States* v. *Carll*, 105 U. S., 611; *United States* v. *Britton*, 107 U. S., 655; *United States* v. *Trumbull*, 46 Fed. Rep., 755. * * * If the particular acts or facts charged do not, as a matter of law, constitute contracts, combinations or conspiracies in restraint of trade and commerce among the several states, or a monopoly or attempt to monopolize any part of such trade or commerce, no amount

> of affirmance and allegations that the accused 'engaged in a combination,' or 'made contracts in retraint of such trade or commerce,' or 'monopolized' or 'attempted to monopolize' the same, will avail to sustain the indictment. Whether the accused is charged with an offense is to be determined by the particular acts or facts set forth, and not by the conclusions of the pleader, although they are asserted in the words of the statute. 'Every offense consists of certain acts done or omitted under certain circumstances, and in the indictment for the offense it is not sufficient to charge the accused generally with having committed the offense, but all the circumstances constituting the offense must be specially set forth.' *United States* v. *Cruikshank*, 92 U. S., 542, 563."

In *Hazard* v. *Griswold*, 21 Fed. Rep., 178, Mr. Justice GRAY held a similar rule as to a pleading at common law averring fraud, and said:

> "By the weight of modern authority English and American, it is well settled that at law, as in equity, a mere allegation of fraud in general terms, without stating the facts on which the charge rests, is insufficient."

The rule, in equity, is that the *main facts* or *incidents* which constitute the wrong complained of, must be stated in a bill in equity, so as to put the defendants on their guard and apprise them of what answer may be required of them.

In *Magniac* v. *Thomson*, 2 Wall., Jr., 209, Mr. Justice GRIER said:

> "A court of equity, when examining a bill of complaint to find a grievance which will justify its interposition, looks to the substantive facts averred in it, not to the adjectives or adverbs which may be added to qualify them."

In *Van Weel* v. *Winston,* 115 U. S., 237-38, the court said of the bill there:

> "It is full of the words fraudulent and corrupt, and general charges of conspiracy in violation of trust obligations. Mere words, in and of themselves, and even as qualifying adjectives of more specific charges, are not sufficient grounds of equity jurisdiction, unless the transactions to which they refer are such as in their essential nature constitute a fraud or a breach of trust, for which a court of chancery can give relief."

This was followed in *Wood* v. *Amory,* 105 N. Y., 278, where Mr. Justice PECKHAM held, that if the act alleged were not in and of itself a fraud, it was not made so by alleging that it was induced by a desire to deceive and defraud the plaintiff; and, in *Hill* v. *Dyerville Mfg. Co.,* 116 Cal., 135, in which it was held, that general averments of fraudulent purpose were conclusions not admitted by the demurrer;—and, in *Horsford* v. *Gudger,* 35 Fed. Rep., 388, where it was held, that the bill must be specific in its statement of the facts; that a charge in general terms that a transaction was fraudulent is not sufficient, but the particulars must be set forth in detail; and that the things done or omitted, constituting the fraud, must be so stated upon the face of the bill that the court may see that they are fraudulent, if proved or admitted; and, in *St. Louis, etc., Ry. Co.* v. *Johnston,* 133 U. S., 577, where the language of the court in *Van Weel* v. *Winston,* is quoted and approved.

Mr. Daniell (1 Dan. Chan. Pldg. & Prac., 324), states the rule as follows:

> "That where it is necessary to allege fraud or collusion, a general allegation of it in the bill will not be sufficient to shut out a demurrer; but that the facts upon which such an allegation is founded

must be stated, as there is great inconvenience in joining issue upon such a general charge, without giving the defendant a hint of any fact from which it is to be inferred."

In *Moore* v. *Green,* 19 How., 69, the court held, that where fraud was alleged, the bill must be specific in stating the facts and circumstances which constitute the fraud; and that *this is necessary to enable the defendants to meet the fraud.*

In *Other* v. *Smithwaite,* L. R., 5 Eq., 437, 441, Sir W. Page Wood, Vice-Chancellor, said, that "nothing is more settled than the doctrine that when you charge fraud, you must state the facts upon which you allege fraud and prove it strictly."

Such words in the bill as "in violation of the provisions of an act of Congress," etc.—and "in order to restrain competition among themselves," and "in order to monopolize such trade and commerce," "have engaged in an unlawful combination and conspiracy to," etc., "which combination is in restraint of such trade and commerce," etc., cannot be relied on to make a case where, as here, the specific acts and facts alleged do not make one.

The jurisdiction of the court in equity under this act is limited to restraining *violations* of the act. Those violations are made crimes by the act, and obviously as rigid a rule requiring the *facts* constituting the criminal combination or conspiracy to be set forth, applies to the bill or petition as the rule applicable to an indictment or pleading at law or a bill in equity, charging fraud. In other words, the bill must set forth the *facts* constituting commission of the offense prohibited by the act as certainly as an indictment must do; and if these paragraphs of the bill would not be held sufficiently to

aver the commission of a crime, forbidden by this act, if they were in an indictment, then they do not show a violation of the act in this bill to restrain violations of the act.

In *Lawson* v. *Hewell,* 118 Cal., 613, a bill in equity was filed by a member of Masonic chapter to restrain the trial within the order of plaintiff upon certain charges, and alleged that the adoption of the rule which he was charged with violating was the result of a conspiracy among defendants, and invalid, and that charges against him and the proceedings taken for their investigation were a part of the conspiracy and in furtherance of its objects; and in holding that a demurrer to the bill was properly sustained, the court say of the conspiracy charge:

> "The charge, moreover, is made in general terms, and without any specifications of fact from which a conspiracy can be inferred."

In the *Addyston Pipe Company case,* 175 U. S., 245 (which was a bill or petition in equity, as this is), the court held that *all the facts and circumstances are to be considered in order to determine the fundamental question, whether the necessary effect of the combination is to restrain interstate commerce.*

In that case, and in every other case in which a bill or petition in equity under this act has been sustained, the facts have been alleged and there has been alleged and shown to the court as a fact the full terms of a distinct and express agreement, which, as construed by the court, was a violation of the act. But in this case, for the first time, the Government asks the court to condemn defendants upon mere charge and epithet without the allegation or proof of any facts showing any violation of the act.

2. THE DECREE OF INJUNCTION IS ERRONEOUS ON LIKE GROUNDS OF INDEFINITENESS. A DEFINITE AND VALID DECREE COULD NOT BE ENTERED UPON THE BILL.

The decree which is here complained of, and which the learned counsel for the Government procured to be entered upon their bill, makes clear the misconception of the Sherman act, upon which the bill and decree were drawn.

Indeed, it is earnestly but respectfully suggested that the bill and decree here appear to proceed upon the theory that Congress, by the Sherman act, has delegated to the Federal court in equity, as soon as the Government should file this general petition asking it, the regulation for all future time of the trade and commerce carried on by these defendants. An examination of the bill and decree will disclose the remarkable situation that by this suit the Federal court has undertaken, without any limit of time, the regulation of the future conduct of industries and trade, which, according to the allegation of the bill, amounts to about 60 per cent. of the total volume of the trade and commerce among the States and Territories in fresh meats. If this decree is to stand, then are each and all of the multitude of transactions which defendants may have, at any time in the future, in that great business, to be done under the watchful eye and supervision of the Federal court, which has undertaken to see to it that in none of these future transactions shall its general injunction not to violate the Sherman act be violated by defendants without their suffering the penalty for contempt of its decree and dignity? Obviously, such a power or function was never intended to be imposed on the Federal courts by the Sherman act.

We conceive that it is to be here taken for granted that in the exercise of the equitable jurisdiction under Section 4 of the Sherman act, which is here invoked, the modes of proceeding to be pursued are those which have been followed in the Federal courts from the beginning, and which were laid down in the judiciary act of May 8, 1792, viz.: that they should be "according to the principles, rules and usages which belong to courts of equity, as contradistinguished from courts of common law" (1 Stat. at Large, 276), and which are prescribed by Rule 90 of the Equity Rules.

With respect, we submit that the learned counsel for the Government, on the other hand, have presented and prosecuted this case on radically new and erroneous lines, which assume that under the Sherman act, not only is a novel jurisdiction and power conferred on the Federal courts in equity, but in the exercise of it the courts are not governed by the principles and rules governing them in other cases.

Let us see:

The decree merely adds the injunction of the court to the prohibitions of the act of Congress, and in terms almost as general and indefinite. It does not condemn or enjoin the making or carrying out of any specific contracts; indeed, there was none alleged or shown which could be made the basis of such a judgment. The decree in effect merely repeats the prohibition of the act of Congress. It enjoins the defendants "from entering into, taking part in or performing any contract, combination or conspiracy, the purpose or effect of which will be as to trade and commerce in fresh meats between the several States and Territories and the District of Columbia, a restraint of trade in violation of said act of Congress of

July 2, 1890," by doing either of several specified things, "or by any other method or device, the purpose and effect of which is to restrain commerce as aforesaid." (Trans., 37-38; *supra*, pp. 11-12.)

And again the defendants are further enjoined "from violating the provisions of said act by combining or conspiring together, or with each other and others, to monopolize or attempt to monopolize any part of the trade and commerce in fresh meats among the several States and Territories and the District of Columbia," by doing certain other specified things (*ibid*).

The specified things which are mentioned in the decree as the "methods or devices" by means of which the forbidden contracts, combinations or conspiracies are made or performed, are not what are enjoined. There is no condemnation of them except as the defendants shall thereby make or carry out the contracts, combinations or conspiracies in violation of the Sherman act which are enjoined. The contracts, combinations and conspiracies which are enjoined are, in general terms, any which, in purpose or effect, will be a restraint of interstate trade, in violation of said Act of July 2, 1890.

If this decree shall stand, who shall hereafter regulate the conduct of defendants' business? Shall they, or shall the Federal court in equity? Who shall regulate the interstate trade and commerce which they may carry on? Is it to be subject to regulation by Congress or by the court?

Again, such an injunction or injunctional order as is here presented is against all precedent or rule. In *Whipple* v. *Hutchinson*, 4 Blatchf., 190, it was held by Mr. Justice Nelson that a writ of injunction, as a general rule, ought to contain a concise description of the par-

ticular acts or things in respect to which the party is enjoined, so that there may be no misapprehension on the subject.

In *Robinson* v. *Clapp,* 65 Conn., 365, the court held that the person enjoined is entitled to know with a reasonable certainty what acts he may and may not do without making himself liable as in contempt of an order.

In *Laurie* v. *Laurie,* 9 Paige, 234, 235, the chancellor held the rule to be that the language of the injunction should in all cases be so clear and explicit that an unlearned man can understand its meaning, without the necessity of employing counsel to advise him what he has a right to do in order to save him from subjecting himself to punishment for a breach of the injunction.

It could be no answer to the point here made against the decree to say that upon the allegations of this bill no more specific decree could have been entered. That only makes more obvious the insufficiencies of the bill. It shows that under our system of jurisprudence no such general, indefinite and omnibus case can be sustained, as is here for the first time attempted under the provisions of the Sherman act.

The bill of complaint here seeks now absolutely to interfere, and the decree in general terms does interfere, with future dealings, as interstate commerce, which at most may be interstate trade or domestic trade, according to the future and changeable intention of the dealer.

Neither the Sherman act nor the commerce clause of the Constitution authorizes such interference.

The alleged combinations and conspiracies of defendants which are charged in the bill of complaint, as they

are there charged, are not confined to interstate dealings, but have to do as well with their transactions which are wholly within a State, and which Congress has no power to regulate. The bill does not set forth *any distinct* or *specific agreement,* which by its terms contemplates and involves interstate trade, or the performance of which in interstate trade is sought to be enjoined—as was the fact in each of the cases heretofore decided. The decree here does not enjoin any such specific agreement, but merely enjoins violation of law. As to each of their future dealings the character thereof will be determined by the future and changeable intentions of the dealers. Some or none of them may be interstate trade. Defendants may take their fresh meats into any State and there sell them as articles of domestic trade, so that if their future dealings shall be interstate it will be at their election at the time. At most, a part only, and not the whole, will be interstate.

We understand that this court has in effect held, or that its reasoning sustains the proposition, that where the future trade and dealings of defendants (which, if interstate, would be in restraint of trade or an attempt to monopolize trade and commerce) may be interstate or domestic trade, according to their future and changeable intention, the Sherman act does not authorize a Federal court to enjoin generally so much thereof as may be or turn out to be interstate trade or commerce.

In *United States* v. *E. C. Knight Co.,* 156 U. S., 15, quoting from *Kidd* v. *Pearson,* it is said:

> "Even in the exercise of the power contended for, Congress would be confined to the regulation, not of certain branches of industry, however numerous, but to those instances in each and every branch where the producer contemplated an interstate market.

> These instances would be almost infinite as we have seen; but still there would always remain the possibility, and often it would be the case, that the producer contemplated a domestic market. In that case the supervisory power must be exercised by the State; and the interminable trouble would be presented, that whether the one power or the other should exercise the authority in question would be determined, not by any general or intelligible rule, but by the secret and changeable intention of the producer in each and every act of production. A situation more paralyzing to the state governments, and more provocative of conflicts between the general government and the States, and less likely to have been what the framers of the Constitution intended, it would be difficult to imagine."

It is submitted that the same "interminable trouble" would be here presented as to the future trade and commerce with which this decree in general terms interferes.

II.

THE BUSINESS OF DEFENDANTS OF PURCHASING LIVE STOCK TO SLAUGHTER FOR THE PRODUCTION OF FRESH MEATS, AND OF SELLING SUCH FRESH MEATS, AS DESCRIBED IN THE FIRST, SECOND AND THIRD PARAGRAPHS OF THE BILL, IS NOT SHOWN TO BE INTERSTATE OR FOREIGN COMMERCE.

In separate paragraphs, numbered first, second and third, the bill alleges different kinds of business, in which the respective defendants are engaged. If these different kinds of business, respectively, as there alleged and described, are not interstate commerce, we contend that the bill does not allege any violation of the Sherman Act. And we submit that none of the business there described

is shown by the facts alleged to be interstate commerce.

In the *first* paragraph the bill alleges that defendants are engaged in the business of buying live stock, to wit, cattle, sheep and hogs, at divers stock yards, and such like open and competitive markets, at divers places therein named, and slaughtering such live stock *at their respective plants at those places,* and *there* converting the said live stock into fresh meat for human consumption (Trans., 4-5.) That paragraph does not allege or show that the live stock so purchased are articles of interstate commerce or that the purchases are interstate commerce. Clearly that business, as there alleged, is not in any way there shown to be interstate or foreign commerce. *United States* v. *E. C. Knight & Co.,* 156 U. S., 1; *U. S.* v. *Boyer,* 85 Fed. R., 425, 435; *Hopkins* v. *United States,* 171 U. S., 592.

In the *second* paragraph it is alleged that defendants are engaged in the business of selling such fresh meats, *at the several places where they are so prepared,* to dealers and consumers in divers other States and Territories and in the District of Columbia and in foreign countries, and shipping the same meats, when so sold, from the said places of their preparation, over the lines of railroad companies, to such dealers and consumers, pursuant to such sales.

The business of selling such fresh meats so there shown is alleged to consist of sales "at the several places where they are so prepared"; and is not interstate commerce. The sales and deliveries here alleged are made and fully completed in the State and at the place where the meats are so prepared. The sales and deliveries, as here alleged, are fully completed at the time of the deliv-

ery of the goods to the carrier at the place of sale, to be forwarded to the buyer. *Merchant* v. *Chapman,* 4 Allen, 362; *Orcutt* v. *Nelson,* 1 Gray, 543; *Waldron* v. *Romaine,* 22 N. Y., 368; *Ramsey & Gore Co.* v. *Kelsea,* 55 N. J. L., 320.

The rule is clearly stated in *Merchant* v. *Chapman, supra* (4 Allen, 364), as follows:

> "It is a well known rule in the law of sales that a delivery of goods to a carrier designated by the purchaser is of the same legal effect as a delivery to the purchaser himself. So (unless there is an agreement to the contrary) is a delivery by the seller to a common carrier, in the usual course of business, although no carrier is named by the purchaser."

The ground of this rule is that the carrier is to be treated, with respect to such delivery and transportation, as the agent of the purchaser. The "shipping the same meats, when so sold, from the said places of their preparation, over the several lines of transportation of the several railroad companies serving as common carriers, to such dealers and consumers, pursuant to such sales," as here alleged (Trans., 5), does not then make the sales interstate commerce. Where, by the contract of purchase, the goods are to be so delivered by the seller to a carrier to be transported to the purchaser, the carrier is the purchaser's agent; and the delivery is then to the purchaser's agent, and the sale and delivery are fully completed upon delivery to the carrier at the place of manufacture and sale, with like effect as if delivered to the purchaser at that place. 2 Kent Com., 499; *Cotte* v. *Harden,* 4 East, 211; *Brown* v. *Hodgson,* 2 Campb., 86; *Groning* v. *Needham,* 5 Maule & S., 189; *Orcutt* v. *Nelson,* 1 Gray, 543; *Merchant* v. *Chapman,* 4 Allen, 362, 364.

The sales then described in the second paragraph of the bill are not interstate commerce. *Crossman* v. *Furman*, 192 U. S., 189, 199.

The carrying of the merchandise to the depot of the common carrier (if the allegation of the bill here referred to is to be construed as alleging that that is done by the sellers), is no part of interstate transportation or commerce, and does not make the goods as yet the subject of interstate commerce. In *Coe* v. *Errol*, 116 U. S., 517, 528, the court held that they are yet "part of the general property of the State," and said:

> "And so we think they continue to be until they have entered upon their final journey for leaving the State and going into another State. It is true it was said in the case of The Daniel Ball, 10 Wall., 557, 565: 'Whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the states has commenced.' But this movement does not begin until the articles have been shipped or started for transportation from one State to the other. The carrying of them in carts or other vehicles, or even floating them, to the depot where the journey is to commence, is no part of the journey. * * * Carrying it from the farm, or the forest, to the depot is only an interior movement of the property, entirely within the State, for the purpose, it is true, but only for the purpose, of putting it into a course of exportation; it is no part of the exportation itself."

The fact that the sale is made with a view to the goods being transported to another State after the sale should have been fully completed does not make the sale interstate commerce. *Kidd* v. *Pearson*, 128 U. S., 1, 23-24; *U. S.* v. *E. C. Knight Co.*, 156 U. S., 1, 13-17.

The charge in the second paragraph of the bill that "in so doing," *i. e.*, in doing the acts therein alleged, the

defendants are engaged in interstate commerce, is a mere conclusion of the pleader from the facts alleged, and does not make them so, if the acts done as alleged are not themselves interstate commerce. *United States* v. *E. C. Knight Co.*, 156 U. S., 1.

In the *third* paragraph, the bill alleges that defendants are engaged in the business of shipping fresh meats from the point where prepared over the lines of common carriers *to their own agents* in other States and Territories, and in the District of Columbia and in foreign countries, for sale by those agents, at the places where said agents so are, and that defendants have been and are through those agents there selling the same to dealers and consumers.

Now, the only transaction referred to in said third paragraph, which involves interstate or foreign commerce, is that of the transportation, and that is entirely a matter between the defendant, shipping to his own agent, and the carrier; and it is entirely unconnected with any subsequent sale by such agent; and is is altogether at an end when the articles shipped are received by the agent of the shipper to whom they are consigned. Any subsequent sale by such agent is not interstate or foreign commerce under the allegations of this bill, and for the purpose of this case. The fact that the owner made such shipments to his own agent, in order that his agent should there sell the articles, does not make the sales interstate commerce, or make any difference with respect to the status or character of the property as the subject of such a sale thereof as is here alleged. *Coe* v. *Errol*, 116 U. S., 517, 525, 526; *Kidd* v. *Pearson*, 128 U. S., 1, 23-24; *United States* v. *E. C. Knight*, 156 U.

S., 1, 13-17; *Austin* v. *Tennessee,* 179 U. S., 343; *Am. Harrow Co.* v. *Shaffer,* 68 Fed. Rep., 750; *Stevens* v. *Ohio,* 93 Fed. R., 793.

The allegation of the bill here, that the shipments from the place of manufacture to the shipper's own agents in other States are for sale there by such agents to dealers and consumers, does not imply that the sales by the agents are interstate commerce. It is not only altogether consistent with, but implies that such sales are there domestic sales. The sales mentioned in the bill are alleged to be to dealers and consumers. They are not alleged to be in "original packages." On the contrary, the bill shows they are not. The shipments being to their agents who are "located at or near the principal markets for such meats," are in large "original packages" to supply many customers, *e. g.,* in carloads. The sales by the agents, being "to dealers and consumers," are in smaller lots. And it is to be here taken, under the allegations of this bill here referred to, that on the receipt of the meat by the shipper's agent, it is made ready and kept for domestic sales to consumers and dealers,—*i. e.,* that before it is sold, the bulk is broken up, and it is placed in the owner's warehouse or store for sale therefrom in separate parcels, and so that the merchandise before the sale to dealers or consumers, "had come to its place of rest for final disposal or sale, and so a commodity in the market," where sold. And so, under these allegations, it is to be taken that at the time of sale, it "had become a part of the general property in the State," and is there handled and sold as such. In other words, this case is the case decided in *Pittsburg Southern Coal Co.* v. *Bates,* 156 U. S., 577, 588-9; *Brown* v. *Houston,* 114 U. S., 623, 632-3; *Emert* v. *Mis-*

souri, 156 U. S., 296, 310; *Singer Mfg. Co.* v. *Wright,* 97 Ga., 123, which settle the point that the sales referred to in said third paragraph of the bill herein, as they are there described, are domestic sales and not interstate trade or commerce.

The point here made, that these sales described in the bill are not, by the facts alleged, shown to be interstate or foreign commerce, is not touched or affected by the point decided in *Brown* v. *Maryland,* 12 Wheat., 419, and other later cases, that one who transports an article from one State to another for sale, *has a right,* which cannot be interfered with by state regulation, to sell it as an article of interstate commerce. He also has a right (not to be prohibited by federal legislation) to make such article a part of the general property of the State, and sell it as an act of domestic commerce. This bill seeks to interfere with that right. There is a constitutional right of private citizens to sell or buy and deal with and treat an article brought from one State into another, either as an article of interstate commerce or as an article of intra-state or domestic commerce, which cannot be denied either by state or federal law. It is, as we conceive, the same right, or of the same nature, as that referred to by the court in the *Hopkins case,* where it is said:

> "What a State may do is one thing, and what the parties may contract voluntarily to do among themselves is another thing." (171 U. S., 603.)

Indeed, a state law might be invalid as an interference with interstate commerce because it invaded the right of the owner at his option to keep and sell an article as an act of interstate commerce; and at the same time a federal statute might be equally invalid which interfered with his right at his option to sell the same article as an

act of domestic commerce. Not only the right of private contract (which is to be favored and not discountenanced), and the freedom of contract, but the freedom of trade and commerce (which it is the purpose of the Sherman Act to promote) may reasonably prevent present regulations of such right in anticipation of its actual exercise. The trouble with the bill here is that it seeks to interfere with transactions which the facts alleged do not show to be interstate commerce. It seeks now absolutely to interfere with future transactions, as interstate commerce, which may be interstate or domestic commerce, at the will of the dealer. Neither the Sherman Act nor the commerce clause of the constitution, authorizes any such interference, as we have shown (*supra,* pp. 39-40).

The question here (to state it most favorably for complainant) is, what is the sale described? Does the bill here (as it must) clearly show, by the facts alleged, that the sales described are interstate commerce? We assert not.

The line of decisions holding that certain state or municipal laws are invalid as regulations of interstate commerce, which purport to impose taxation, license requirements or other regulations, upon sales of, or the right to sell, products of other States, where it is apparent (*e. g.,* from the *discriminating* character of the law in question), that the purpose thereof was thereby to *exclude* the introduction into the State of such article and the right of interstate commerce therein, or so burden the bringing of such article into the State for sale or the sale thereof, as to interfere with the owner's constitutional right to sell as interstate commerce, and to prevent interstate commerce therein,—have no application here. Among such cases are *Welton* v. *Missouri,* 91 U. S.,

465; *Walling* v. *Michigan,* 116 U. S., 446; *Minnesota* v. *Barber,* 136 U. S., 313; *Brimmer* v. *Rebman,* 138 U. S., 78; *Schollenberger* v. *Pennsylvania,* 171 U. S., 24-25, and *Brown* v. *Maryland.*

Thus the business in which it is alleged in the bill defendants are engaged, is not shown by the facts alleged to be interstate or foreign commerce, but domestic commerce.

The trade and commerce referred to in the *fourth* and *fifth* paragraphs of the bill add nothing to the previous allegations as to the nature of the business or trade described; and it does not change the character of that business, as it is shown to be by the facts alleged in the bill, or make it interstate or foreign commerce where the facts alleged do not so make it, merely to designate it as trade and commerce among the States or Territories and the District of Columbia and with foreign nations, or to charge it to be so.

III.

THE BILL OF COMPLAINT DOES NOT SHOW ANY CONTRACT, COMBINATION OR CONSPIRACY IN RESTRAINT OF INTERSTATE TRADE OR COMMERCE, WITHIN THE MEANING OF SAID ACT OF CONGRESS.

THE BILL OF COMPLAINT DOES NOT ALLEGE ANY ACTS OF DEFENDANTS MONOPOLIZING, OR ATTEMPTING TO MONOPOLIZE, OR COMBINING OR CONSPIRING TO MONOPOLIZE ANY PART OF SUCH TRADE OR COMMERCE WITHIN THE MEANING OF SAID ACT.

IF THE ACT OF CONGRESS IN QUESTION SHOULD BE GIVEN A CONSTRUCTION WHICH WOULD SUSTAIN THIS BILL OF COMPLAINT, SUCH ACT WOULD VIOLATE THE PROVISIONS OF THE CONSTITUTION OF THE UNITED STATES.

The different acts charged to be violations of the Sherman Act are set forth in the sixth, seventh, eighth, ninth, tenth and eleventh paragraphs of the bill of complaint; and they are different and distinct causes of action. It is not possible to treat together, or as one cause of action, the different and unconnected acts which are claimed to constitute the several alleged offenses referred to respectively in these paragraphs of the bill. The first alleged offense (in the sixth paragraph) has no sort of connection with or relation to the second one (set up in the seventh paragraph), or with any of the others, nor has any one any connection with or relation to any other.

The bill is bad on demurrer for multifariousness and misjoinder. It alleges five or more different and unconnected offenses.

That point, however, will be dealt with further on. Here we beg to urge that neither of these paragraphs alone, nor all together, charge any violation of the Sherman Act. Let us see:

1. The alleged offenses charged in the sixth and seventh paragraphs.

In the *sixth* paragraph of the bill a combination and conspiracy of defendants is alleged for directing and requiring their respective purchasing agents at said stock yards and such like open and competitive markets where they customarily purchase live stock (to wit: the places mentioned in the first paragraph), to refrain from bidding against each other except perfunctorily, for live stock (the same being live stock produced and owned principally in other States and Territories and shipped by the owners to said stock yards for competitive sale to persons and corporations engaged in producing and dealing in fresh meats in the manner aforesaid); and by this means inducing and compelling owners to part with such live stock at less prices than they would receive if such bidding were really competitive; and that defendants have caused and are causing their agents respectively to refrain from bidding accordingly, and have induced and are inducing each other, and will, unless restrained, continue, in pursuance of such conspiracy, to induce each other to refrain from bidding as aforesaid. (Trans., 5-6.)

In the *seventh* paragraph a combination of defendants is charged for the converse purpose of bidding up the prices of live stock at such stock yards, through their respective purchasing agents, for a few days at a time, so that the market reports will show higher prices than the state of

the trade will warrant, and thereby inducing owners of such live stock in divers States and Territories to make simultaneously large shipments to such stock yards and markets instead of shipping to more natural and advantageous markets and at more natural and advantageous times, and by reason of resulting large offerings (and by thereupon refraining from bidding against each other for the same) obtaining such live stock at less prices than it would bring in the regular way of trade; and it is charged that defendants have been, and are, through their said agents, so fraudulently bidding up prices of such live stock, and will, unless restrained, continue so to do. (*id.*, 6-7.)

We submit that, taking the allegations of the bill, either by themselves or in connection with other facts as to trade and commerce which are matters of common knowledge, and in view of which the bill is to be construed, and drawing the fair inferences, these remarkable charges allege no violation of the Sherman Act.

It appears from the bill that the purchase of live stock by the respective defendants are made for the purpose of slaughtering the live stock and converting it into fresh meat for human consumption, at the points where the live stock is purchased. and selling such fresh meat at the places where they are so prepared, to dealers and consumers in divers state and territories and in foreign countries. (Trans., 4-5.) The demand from day to day for such fresh meats is for present consumption, and is a constant demand, and must be of substantial uniformity. In other words, the respective defendants, in buying their live stock and converting the same into fresh meat, do so in view of and to supply a demand for fresh meats,

the extent of which may be practically known to or judged of by them, but is not created or controlled by them. It is obvious that they cannot create a fictitious demand for their fresh meats, which are a perishable commodity and must be disposed of for consumption very shortly after the live stock is slaughtered. And so, for the same reason, they cannot create a fictitious demand or materially lessen the normal demand for the live stock required to be slaughtered to supply such demand for their fresh meats.

The live stock is bought by them for immediate slaughter, as their present needs require. Practically, then, they cannot buy substantially more, or fail to buy substantially less, live stock, than they believe the demand upon them for fresh meats for their trade requires. This business is not a speculative business, but with a known output and demand for fresh meats they buy and slaughter so much live stock from day to day as will supply that output.

As against each other, their business is necessarily competitive, both in getting customers for their output and in buying live stock with which to supply those customers. In the nature of things, that competition cannot be destroyed or materially lessened by them. Increase of business of one means less business for others.

These extensive packing establishments of the different defendants are capable, respectively, of slaughtering, from day to day, each a certain quantity of live stock. They cannot slaughter more than their capacity, and they cannot, without loss, slaughter less than will keep their large plants and forces of employes substantially occupied; and they cannot, without loss, buy from day to day much in excess of their then needs, and carry over and feed and care for quantities of live stock which are not required

by them for immediate slaughter. The enormous carrying charges, yardage, care and feeding of the stock in the yards of the stock yards companies evidently forbid that. The business is a cash business,—the defendants buying and paying in cash for the live stock as bought.

The supply of live stock, on the other hand, is much more variable, and this is strikingly so with respect to seasons or times at which it is in condition for the market. This gives rise to variations in the market value, depending upon the variable supply of live stock ready for the market at different seasons or times, as compared with the more uniform and steady demand for fresh meats.

It is evident that, by reason of the above facts, the power of the defendants (except at great loss to themselves) to bid up or down the prices of live stock is insignificant. This would be evidently true if they were the only purchasers. But it appears from the bill that about forty per cent. of the trade and commerce in fresh meats among the states and territories is in the hands of other persons who are purchasing live stock and slaughtering it and selling fresh meat in competition with each of the defendants. (Trans., 5.) There is nothing in the nature of a natural monopoly in the business; the field is an open one; any other persons are free to enter it; and so the amount of the trade in the hands of others than defendants may at any time become seventy-five or ninety per cent. of the entire amount.

Again, it is said in the *seventh* paragraph of the bill, that there are "more natural and advantageous markets" for such shippers, than the markets at which the defendants purchase live stock. (Trans., 7.) It is obvious,

then, and is of common knowledge, that the "market reports" of such high prices of live stock there alleged to be offered by defendants, will reach and influence such other "more natural and advantageous markets" sooner than, or at least as soon as, they reach the live stock owners on their ranches and farms, and the prices at all the markets will be uniform. The defendants could not bid up prices for a few days at a time at the markets at which they purchase, without a corresponding increase in the prices at the more natural and advantageous markets for the shippers which are referred to; and so the defendants could not thereby expect to draw from such other markets live stock which would naturally or more advantageously go there. It is obvious, too, that the defendants could not, to their own profit, bid up prices beyond those required by the then actual demand in order to induce excessive shipments of more live stock than they could advantageously slaughter upon their purchase.

The bill, which is meager in its allegations of fact, is to be construed in view of other facts of common knowledge as if they were also alleged; and while, for the purpose of this hearing, the material allegations of fact in the bill, which are well pleaded, are to be taken as admitted upon the demurrers, the demurrers do not admit the soundness of legal conclusions charged in the bill.

The use of the word "bidding" in the sixth and seventh paragraphs of the bill, is not to be construed as an allegation that these sales of live stock are at any public vendue to the highest bidder. They are private sales made in the numerous pens in which the live stock is yarded, upon an inspection of their condition, grade and quality by the buyer, and are like the sales of goods in a shop over the counter, where the prices are fixed by the

seller, or by agreement of the two persons, buyer and seller.

As to these dealings, as they are alleged in the bill, we maintain:

1. *The purchases of live stock referred to in the sixth and seventh paragraphs of the bill, as therein alleged, are not interstate commerce.*

These purchases are alleged to take place at certain stock yards and such like markets, at which are situated the slaughtering houses of the respective defendants who make such purchases of the live stock for slaughter at their houses there. (Trans., 4, 5-6.) The first paragraph in which the business of defendants in buying live stock is alleged, as we have shown (*supra*, p. —), does not allege or show it to be interstate commerce. (Trans., 4-5.) The sixth paragraph describes the live stock there referred to as being live stock produced and owned principally in other states and territories of the United States, and shipped by the owners thereof to such stock yards and open markets for competitive sale to persons and corporations engaged in producing and dealing in fresh meats in the manner aforesaid (*id.*, 6). But this neither alleges, nor tends to show, that the sales, so contemplated and made after the live stock have so reached the state in which they are sold and delivered, as is here alleged, are interstate sales or trade. It is not alleged the purpose of the owners is to sell or of the defendants to buy the live stock as an article of interstate commerce. On the contrary, it is to be taken from these scant and cautious allegations that the live stock, when it is so offered for sale, has become part of the general mass of property of the state where it is sold. *Brown* v.

Houston, 114 U. S., 622, 632-33; *Pittsburgh Coal Co.* v. *Bates,* 156 U. S., 577, 588-89; *Emert* v. *Missouri,* 120 U. S., 489, 497; *Diamond Match Co.* v. *Ontonagon,* 188 U. S., 82, 92-97.

> "The property is at rest for an indefinite time, awaiting sale at its place of destination." (188 U. S., 95-96.)

Clearly, the sales and deliveries of such live stock (which are altogether made in that state and at the place where both the live stock sold and the purchaser and his slaughter house are) are not to be taken as interstate commerce, in the absence of distinct allegations and showing to that effect, but, under these allegations, they are to be taken as intra-state or domestic purchases.

There are no other allegations of fact in the bill than those above referred to which tend to show that the trade referred to in the sixth paragraph is interstate commerce; and we submit that, for this reason, no case is made in that paragraph of a violation of the Sherman Act.

All this is equally true of and applies to the seventh paragraph. (Trans., 6-7.) The trade there referred to is not interstate commerce, under the allegations of the bill.

If we assume that the lack of any sufficient allegations or showing of facts, that the trade referred to in the sixth and seventh paragraphs is interstate commerce, may be supplemented by other actual facts as to this trade, as being matters of common knowledge, the case of the learned counsel for the Government is no better off. In the *Anderson case, supra,* the question whether the purchases by the defendants there on their own account at the Kansas City stock yards, of cattle owned in and shipped there from other states and territories for sale,

as they were there shown, were interstate commerce, was raised, but not decided. (171 U. S., 614-15.) In the *Hopkins case,* it was held that the commission merchants, who sell the cattle consigned to them from other states, and who, in order to secure the business, send their agents into such other states to the owners to solicit the business, and lend money to the cattle owners upon mortgages upon the cattle and make advances of a portion of the purchase price of the shipments of cattle to them to be sold, by the payment of drafts drawn upon them by the owners in other states at the time of the shipment,—are not engaged in interstate commerce. (171 U. S., 587-92.) The facts so to be taken notice of are these:

The live stock so sent to these stock yards for sale is consigned to commission merchants, such as those who were defendants in the *Hopkins case.* Under the allegations of this bill it is to be taken that upon the arrival of the cattle they are divided up and distributed in the pens of the stock yards and commingled with the general mass of other property of the state. They are then yarded, cared for, fed and watered by the stock yards company for hire, until they are sold; and they are there sold by the commission merchants, who are the only persons known to the defendants, and who sell the live stock and collect the proceeds as principals or owners of the cattle, and who, according to the decision of the *Hopkins case,* are not engaged in interstate commerce. When bought by any of the defendants, they are, according to the allegations of the bill, bought for the purpose of being slaughtered and converted into fresh meat by the defendants at that same point. (Trans., 4, 5.) The alleged restraint of trade or competition in the sixth and

seventh paragraphs of the bill complained of, are "as to the purchase of live stock necessary to the production of the meats produced by them." (*id.*, 5, 6.)

In *Brown* v. *Houston*, 114 U. S., 622, it was held that coal mined in Pennsylvania and sent by water to New Orleans to be sold in open market there on account of the owners in Pennsylvania, becomes intermingled *on arrival there* with the general property in the State of Louisiana, although it may be, after arrival, sold from the vessel without being landed and for the purpose of being taken out of the country on a vessel bound for a foreign port. Now, if that property had become so intermingled with the general property in the state, how is it with the cattle here in question when the carloads are so broken up and the cattle placed in new combinations in the pens of the stock yards for sale, by commission merchants who sell the cattle as their own, but are not themselves engaged in interstate commerce? If the coal in the vessel of the shipper had ceased to be the subject of interstate commerce and subject to taxation by the state, clearly the cattle held in the pens of the stock yards had ceased to be articles of interstate commerce, and are so situated that defendants, who were buying for slaughter at that point, have *the right* to buy such cattle as articles of domestic commerce. If the State of Louisiana could subject to taxation, as part of the general property of the state, the coal shipped by the owners at Pittsburg in their own barges to Baton Rouge for sale there, even while in the original barges in which it was shipped, as held in *Pittsburg & Southern Coal Co.* v. *Bates*, 156 U. S., 577, clearly any of the defendants here had as much right to regard and to deal with and purchase, and agree together to purchase or not to purchase,

as articles of domestic commerce, any cattle held and found by them in the pens of the stock yards of Kansas City or Chicago.

The case of the Government here requires a clear showing, by allegations of fact, that this live stock was, and remained at the time of defendants' dealings with respect thereto, an article of interstate commerce, *and that they so treated and dealt therewith.*

In *Emert* v. *Missouri,* 156 U. S., 296, it was held that where goods were sent by the Singer Company, in New Jersey, to its own agent in Missouri for sale there, and such agent travelled about and offered such goods for sale in pursuance of such shipment, a statute of the State requiring such peddlers of goods to take out and pay for licenses was not a regulation of interstate commerce; and it was said, quoting from the opinion in the *Robbins case,* 120 U. S., 489, 497:

> "When goods are sent from one State to another for sale, or in consequence of a sale, they become part of its general property and amenable to its laws; provided that no discrimination be made against them as goods from another State. * * * 'The negotiation of sales of goods which are in another State, for the purpose of introducing them into the State in which the negotiation is made, is interstate commerce.'"

The *Emert case* last cited emphasizes the point we suggested above, that cases where State regulations have been held to be *invalid* as an interference with interstate commerce because *discrimination* is thereby made against goods as goods from another State stand upon a distinct ground, and are not applicable here.

The learned counsel for complainant cannot take the case at bar out of the application of the cases above

cited. Indeed, this case, so far as based upon the sixth paragraph of the bill here in question, is strikingly similar, in principle, to those cases. Property subject to taxation as domestic property is subject to purchase as domestic property. And when property is so circumstanced in a State, that it is not the subject of interstate commerce when the State seeks to tax it, or that dealings therein are not interstate commerce when the State seeks to license those dealings—then, obviously, citizens of that State seeking there to buy the property so situated, may deal with it as domestic property of the State. The question in those cases cited was as to the power of the State to treat property brought into the State or to regulate the transactions therein. The question here is as to the right of private citizens engaged in business in the State to buy property brought into the State, as domestic property, after it is so brought in and is there offered for sale, and their right, by their mutual agreements with each other, to treat and regulate their own purchases thereof, as domestic commerce.

The court in the *Hopkins case* (171 U. S., 578, 590), in remarking that "the selling of an article at its destination, which has been sent from another State, may be regarded as an interstate sale," did not hold that purchases, such as are alleged to be made by defendants in the sixth paragraph of the bill, are interstate commerce. Issues were made in that case, and the contention made by the defendants in their answer was that the exercise of their occupation as commission merchants did not constitute or amount to interstate commerce (p. 583); and this was sustained by the court. There was no question made with respect to the character of the sale, and the court held that that was "not the substantial factor in the case." (p.

588.) The selling of such article at its destination which has been sent from another State, may or may not be an interstate sale; but whether it was or not was immaterial in the *Hopkins case*, because even if the sales were interstate commerce, the business of defendants was not interstate commerce.

There is a clear distinction between a contract or combination of sellers, with respect to their contracts, which include, in one undertaking, the sale in one State of an article and (as a part of such sale) the transportation of the article for and delivery by the seller to the buyer in another State, and a mutual contract or combination of local buyers, buying for local consumption or use, articles already in the State when purchased. The mutual contracts of such local buyers with each other, respecting such purchases, are quite a different thing, with respect to the application of the Sherman Act, from such a combination of shippers.

2. *But if these purchases of cattle are interstate commerce, the acts alleged in the sixth and seventh paragraphs are not violations of the Sherman Act.*

They are merely acts of defendants in the conduct of their own business, much more strictly so than were the contracts and combination of the yard traders which were upheld in the *Anderson case*. It is not alleged that they in the least assume to control or affect the conduct of any other persons than themselves, as was done in the case last cited. It is not alleged that sales are lessened, or that that is the necessary effect of defendants' acts, as was the fact in the *Anderson case*. It is not alleged that, as a result, unreasonable prices for cattle are fixed or sought to be secured. It is not alleged or

shown that any injury to the public will result; or that commerce will be directly, immediately or necessarily restrained by the acts charged. This case of the Government is not nearly as strong in that respect as that made against the traders in the *Anderson case* last cited. The agreements and acts there were regarded as within the constitutional right of private contract.

Upon this point, this court said in the *Hopkins case* (171 U. S., 591):

> "Even all agreements among buyers of cattle from other States are not necessarily a violation of the act, although such agreements may undoubtedly affect that commerce."

A striking application of this rule was made in the *Anderson case,* where the decision proceeded upon the assumption that the dealings of the defendants were interstate commerce (171 U. S., 615); and where the mutual agreements of the defendants (members of the Traders' Live Stock Exchange) were definite agreements with each other, the effect of which was that they would not purchase cattle from, but would boycott, commission merchants who sold cattle to other traders and speculators who were not members of defendants' Exchange. (*Id.,* 608-9, 614.)

In the *Joint Traffic case,* 171 U. S., 568, the Supreme Court say:

> "An agreement entered into for the purpose of promoting the legitimate business of an individual or corporation, with no purpose to thereby affect or restrain interstate commerce, is not, we think, covered by the act, although the agreement may indirectly and remotely affect that commerce."

An in the *Hopkins case,* 171 U. S., 592, the court again said:

"The statute applies only to those contracts whose direct and immediate effect is a restraint upon interstate commerce. * * * The effect upon interstate commerce must not be indirect or incidental only."

And again (pp. 602-3) the court say of the right of dealers to agree together to restrict their operations:

"We say nothing against the constitutional right of each of the defendants and each person doing business at the Kansas City stock yards to send into distant states and territories as many solicitors as the business of each will warrant. This original right is not denied or questioned. But cannot the citizen, for what he thinks good reason, contract to curtail that right? To say that a State would not have the right to prohibit a defendant from employing as many solicitors as he might choose, proves nothing in regard to the right of individuals to agree upon that subject in a way which they may think the most conducive to their own interests. What a State may do is one thing, and what the parties may contract voluntarily to do among themselves is quite another thing."

And so here, the alleged mutual agreements (if it amounts to that) of defendants respecting their own acts in the matter of purchase of cattle, are only the exercise by them of their right to conduct their own business according to their own judgment, which was recognized in the above cases.

The following was laid down as to the construction of the Sherman Act, in the *Hopkins case* (171 U. S., 600), and was reasserted in the *Joint Traffic case* (171 U. S., 568):

"The Act of Congress must have a reasonable construction or else there would scarcely be an agreement or contract among business men that could not be said to have, indirectly or remotely,

> some bearing upon interstate commerce, and possibly to restrain it. We have no idea that the act covers or was intended to cover such kinds of agreements."

We ask no more than that this principle be kept in mind in considering the charges in this bill.

2. The charge in the eighth paragraph. (Trans., 7.)

The sole charge in the eighth paragraph is of a combination by defendants to raise, lower and fix prices, and to maintain uniform prices, at which they will sell their fresh meats. It is alleged that this is effected through the action of divers agents of defendants in secretly holding meetings and agreeing on the prices; and that the prices have been and are maintained by defendants by adhering to the same in their sales, by collusively restricting and curtailing the quantities of meat shipped by them in such trade and commerce to said markets, whenever necessary or conducive to the maintaining of prices so fixed, by imposing against each other penalties for deviations therefrom, by establishing a uniform rule for the giving of credits to dealers, and by notifying each other of delinquencies of dealers and keeping what is known as a "black list" of such delinquents, and refusing to sell meats to such delinquents.

(1) We have above argued that the business of defendants in the sale of fresh meats, as described in the second and third paragraphs of the bill, is not shown to be interstate or foreign commerce (*supra*, pp. 41-48). The sales there referred to are the sales made directly to dealers and consumers at the places where the meats are prepared, as alleged in the second paragraph of the

bill, which are fully made and completed and the deliveries thereon made, at the places where the meats are prepared. (*Supra*, pp. 41-43.) Or sales made by the respective agents of defendants having their meats at other places, to whom defendants have previously shipped such meats, as alleged in the third paragraph. As to all these sales the bill does not show that the sales are interstate commerce; but under its allegations they are to be regarded as domestic commerce of the states where made, as we have shown. (*Supra*, pp. 41-48.) The eighth paragraph itself fails to allege or show that the sales referred to are interstate commerce. There is, then, no contract or combination in restraint of interstate commerce alleged in the said eighth paragraph.

(2) But if the business of defendants described in said bill and referred to in said eighth paragraph is interstate commerce, no violation of said Sherman Act is therein charged.

The charge in the eighth paragraph of the bill is nakedly of an alleged combination of defendants to raise, lower and fix and to maintain *their own* prices for *their own* property in sales thereof *by themselves*. It will be observed that this is not in itself anything which the Sherman Act expressly prohibits or makes criminal. We submit that it is entirely lawful for dealers to fix and so raise or lower or maintain the prices of their own commodities, in their own sales thereof. It is not forbidden by the Sherman Act or by any other, but is a constitutional right.

Nor does the Sherman Act forbid or aim at a contract or combination to raise, lower or fix prices, or to maintain prices. Freedom of trade and not prices is the object of the act. It aims at that which is *directly, imme-*

diately and *necessarily* the restraining of trade to a *substantial* extent. "From time to time to raise, lower and fix prices, and to maintain uniform prices," is not directly and necessarily to restrain trade. It is rather an exercise of a freedom of trade than a restraint of trade. Every contract made by a seller and buyer fixing a price of a commodity in a sale thereof is an illustration. The combination alleged here is not in restraint of trade or a monopoly of trade, within the meaning of that act. That was laid down by this court in the *Hopkins* case, 171 U. S., 592; the *Anderson* case, 171 U. S., 615, in the Traffic cases, and in the *Addyston* case, 175 U. S., 228-9, 245.

That the allegation of a contract or combination among manufacturers or producers of an article which is intended to become the subject of interstate commerce, to raise, lower and fix prices of such article, does not charge a contract, combination or conspiracy in restraint of interstate trade or an attempt to monopolize that trade and is not sufficient under the Sherman Act, is clear from all the authorities. (*United States* v. *Nelson*, 52 Fed. R., 646; *in re Greene*, 52 Fed. R., 104; *United States* v. *E. C. Knight & Co.*, 156 U. S., 1, 16; *Gibbs* v. *McNeeley*, 102 Fed. R., 504, 507.) In the *Knight* case, 156 U. S., p. 16, this point was distinctly ruled as the point of decision. The court there held that while contracts, combinations or conspiracies to raise or lower prices "might unquestionably tend to restrain external as well as domestic trade," yet "the restraint would be an indirect result, however inevitable and whatever its extent, and such result would not necessarily determine the object of the contract, combination or conspiracy." And the court further held:

> "It was in the light of well settled principles that the Act of July 2, 1890, was framed. *Congress did not attempt thereby* to assert the power to deal with monopoly directly as such; or *to limit and restrict* the rights of corporations created by the states or *the citizens* of the states *in the acquisition, control or disposition of property; or to regulate or prescribe the price or prices at which such property or the products thereof should be sold.*"

It was there alleged and was an evident fact that the American Sugar Refining Company and Searles entered into the contracts in question in order to obtain complete control of the production and price of refined sugar in the United States and thereby did control the price of refined sugar and the production of about 90 per cent. thereof in the United States. Under the public policy which is a part of the common law system of jurisprudence of the American States, that form of combination has been held to be a most odious attempt to create a monopoly and restrain trade. (*Distilling Co.* v. *People*, 156 Ill., 468; *Glucose Co.* v. *Harding*, 182 Ill.) And the bill in the *Knight* case sought no more than the bill here. It sought to regulate the business of the defendants so far as it should be or become interstate commerce.

The bill here at bar does not allege that defendants control the business in fresh meats; nor does it allege or set forth any facts showing that defendants have combined to control said trade and commerce in fresh meats, or all of it in any of the markets or places referred to therein, or more than that which is now their own. It does not show that the alleged combination tends to any complete monopoly, which is necessary as held in the Knight case, *supra.*

The bill does not allege or show that defendants have

contracted or combined, in any manner, to restrict or interfere with the business of their competitors or others, or that they have done any act tending to that end; or that trade in fresh meats has been or is or will be in any way lessened by or under said alleged combination; or that by reason thereof the required supply of fresh meats in any of those markets has been or will be lessened.

The naked allegation of a combination of defendants to raise, lower and fix prices and to maintain prices in their own voluntary sales (which is all that paragraph eight of this bill contains) does not set forth a contract, combination or conspiracy in restraint of trade or commerce, or a monopolizing or an attempt to monopolize or a combining or conspiring to monopolize any part of such trade or commerce, as was held in the *Knight* case. Neither the act which the defendants are charged with combining to do is criminal or unlawful; nor are the *means* charged unlawful.

When the conspiracy charged is to do an act not in itself criminal, that charge must be accompanied with the further statement of means which defendants agreed together to use to effect the object; *and those means must appear to be criminal. Comm.* v. *Shedd,* 7 Cush., 514; *Comm.* v. *Hunt,* 4 Metc., 111, 129-30; *Pettibone* v. *United States,* 148 U. S., 203.

Here the acts charged as the means, if relied on to make the combination charged a conspiracy, must be violations of the Sherman Act, because that act alone is the source of the jurisdiction here. But they are not forbidden by that or any other law. A look at the means here charged will show that they are not unlawful. One of them is:

"By collusively restricting and curtailing the

quantities of such meats shipped by them in such trade and commerce to the markets aforesaid whenever necessary or conducive to the maintaining of the prices so fixed."

There is here no allegation of any mutual contract or combination so to restrict or curtail shipments. The most that is suggested is that it is done "*collusively.*" The defendants are entitled, upon a fair construction of this bill, to the most favorable interpretation of which the acts charged against them will admit. So far as price is concerned, the allegation is entirely consistent with no purpose of any defendant more illegal than to prevent his making sales at losing prices. No attempt on our part to justify this legal action of defendants is called for. And there is nothing illegal in any defendant's curtailing his shipments in order to maintain his prices.

But the restriction and curtailing the quantities of fresh meats to be shipped, by a mutual understanding among the shippers to that effect, would not be illegal, but entirely justifiable in the interest of the public as well as of their own legitimate business. The charge here amounts at most to this: The respective defendants (who are sellers in certain markets in competition with each other, of fresh meats prepared by them at points remote from said places of sale) respectively keep themselves informed of the circumstances respecting the supply and demand at those markets, as a prudent dealer in an article so perishable should do; and in so doing they respectively learn from each other the amount of fresh meat which other of defendants may have in that market for sale; and they having (as is alleged) combined "to raise, lower and fix prices, and to maintain uniform prices at which they will sell," each accordingly regulates

the amount of fresh meat *he will himself* have there for sale at that time, so as to prevent an overstocked market. Maintaining of prices in that manner is synonymous merely with preventing a glut of perishable meats in the market. To illustrate: Two or three or more of the defendants are selling fresh meat competitively to dealers and to consumers in some city, say Syracuse, New York, which of course requires only a limited amount of fresh meat each day. This meat is produced in Chicago, Kansas City or other remote western slaughtering points and sent by the producers in cars over the railroads to their respective agents at Syracuse, and is there placed in their own warehouses and offered for sale. If each acts without any knowledge of what the other is doing in that market, there will be an over-supply of fresh meat in their warehouses there. The meat has to be sold at that point. It could not be moved to another market without great loss; and it must be sold there quickly, or it will spoil and serious loss result. Even a cutting of the price would not dispose of such surplus before it would be injured and spoiled, because the demand there is substantially a fixed one, and increase in consumption and demand there in fresh meats is not quick enough to absorb the excess, and honest or prudent dealers would not at any price purchase—and unscrupulous or imprudent dealers should not be permitted to purchase—more meat than they could dispose of to their customers while it is still fresh and wholesome. If by reason of reduced price such oversupply should be disposed of by the defendants, either the dealers and public would be likely to suffer the loss of the meats when spoiled and thrown away, or the consumers would have palmed off on them tainted and unwholesome meats. In either case defendants would suf-

fer loss in their business, not merely in the cutting of prices below cost, but in the frequent claim (however, unjust) that the quality of their meats was bad when sold by them.

Human experience teaches no fact more indubitably than that a glutted market of a perishable article of human food is a menace to the public health and welfare; and that the unrestrained competitive struggle to get rid of such glut inevitably tends to fraud and cheating of the unwary consumer and his consumption of tainted and unwholesome food. It is equally certain that this would be caused and accomplished by the temptation to dealers and consumers of cut prices. There is no lessening of trade whatever by the action of defendants in maintaining uniformity of prices as between themselves for their own perishable commodity, unless it be the prevention of a glutting of the markets with perishable fresh meat and the evils thereof above mentioned, and of the dishonest trade which would be induced.

These considerations are sustained by facts which are a matter of common knowledge of which the court takes judicial cognizance. And the scant allegations of the bill are to be read, as if all the surrounding facts and circumstances, under which the alleged acts and agreements of defendants took place, and which are of common knowledge, were themselves also alleged.

So the curtailing of shipments, to prevent an overstocked market and the consequent cutting of prices to get rid of it, is for the public good. At any rate, it is not in illegal restraint of trade. It is as proper, and on like grounds, as the rules of the Traders Exchange were held to be in the *Anderson case*.

This was recognized by the learned circuit judge in the final decree, but not by counsel in their bill; and the decree accordingly limits the injunction in that respect by providing that nothing therein shall be construed to prohibit defendants "from curtailing the quantity of meat shipped to a given market, when the purpose of such arrangement in good faith is to prevent the over-accumulation of meats as perishable articles in such markets." (Trans., 34.)

That the motive of the merchant may be to promote his own business interests and prevent a demoralization of prices and save himself from loss or secure himself a reasonable profit, would not affect the rule. That is the proper purpose of conducting any business.

The act is not brought within the condemnation of the law merely because of the intent. "An act which does not amount to a legal injury cannot be made actionable because it is done with a bad intent." *Stevenson* v. *Newnham*, 13 C. B., 285, per Parke, B.; *Allen* v. *Flood* (1898), App. Cases, 1.

Another of the "means" mentioned in the eighth paragraph of the bill is "by establishing a uniform rule for the giving of credits to dealers." Another is "by notifying each other of the delinquencies of the said dealers, and refusing to sell meats to any of such delinquents."

While in studying even these specifications one cannot get away from the impression that the learned counsel for the Government, in drafting this bill, have covered up the meagerness and poverty of their case by indefiniteness and generality, yet it is obvious that when counsel descends to any specific facts, those facts defeat their epithets and general charge, and show that what defendants

have in fact done are proper acts in the conduct of their own business, and are not violations of the act of Congress. Whenever they assume to specify any acts, the acts specified are legal and innocent, and not illegal or noxious. If these specifications have any meaning, it is that the defendants, competitors in business in the sale of fresh meats in a market or markets, have established a uniform rule as to giving credit to dealers purchasing from them, under which rule they refuse to sell meat upon credit to any "delinquent," that is, to a dealer who does not pay his bills. A delinquent is one who has failed to perform a duty or discharge an obligation. The only duty or obligation here referred to is the payment of just debts for which credit was extended. That this action of defendants in stopping credit to these delinquents is not in restraint of trade, within the meaning of the act of congress, would seem to be clear upon this mere statement without any citation of authorties. The ruling of the Supreme Court in the *Anderson case* sustaining the rules of the Traders' Live Stock Exchange of Kansas City, which tended to maintain commercial honesty, is squarely in point.

And it is equally plain that such action would not have the effect or be a means of raising or maintaining prices of meat. The natural and reasonable effect of such action would be to lower the price of meat. For a merchant to so restrict the credits given to customers as to lose no money in bad debts, is to enable him to lower prices; while if careless in the matter of credits, his losses from bad debts will be made good by a higher price to customers who pay.

Here, again, the circuit judge recognized the strength of this position by qualifying the decree of injunction that

nothing therein should be construed to prohibit defendants "from establishing and maintaining rules for the giving of credit to dealers, where such rules in good faith are calculated solely to protect defendants against dishonest or irresponsible dealers." (Trans., 34.)

These qualifications were plainly called for if any such injunction at all regulating defendants' business in these respects were to be entered. But the whole bill and decree show that the wholesale regulation by a Federal court of the conduct of private business upon the general allegations of such a bill as this, was never contemplated by the makers of the Constitution or authorized by the Sherman Act; and this is emphasized by these necessary qualifications of the decree. Instead of qualifying the injunction, the court should have refused the injunction and dismissed the bill, and declined the function of thus regulating trade and commerce and the future conduct of defendants' business.

3. The charge in the ninth paragraph. (Trans., 7-8.)

This is that defendants have combined to require their respective agents at many of the markets for fresh meats to make and impose uniform charges for cartage for the delivery of meats, upon sales by them to dealers and consumers in those markets. All that has been said respecting the other paragraphs applies with peculiar force to the ninth paragraph. The transactions here referred to, as they are alleged, are not shown to be interstate or foreign commerce. And the alleged action of the defendants in the premises is not in restraint of trade.

This point is determined in our favor by *Penna. R.*

R. Co. v. *Knight,* 192 U. S., 21, where the cab service performed could be contended to be a part of the interstate transportation with much more force than the contention can be here made that the cartage service here in question (which is rendered within the state, after a domestic sale has been made and as a part thereof), is interstate commerce.

In *Detroit, etc., Railway* v. *Interstate Commerce Commission,* 74 Fed. R., 803, 808-9, 811, it was held that even in the case of common carriers the cartage service in the delivery of goods transported over a railroad is a distinct, disconnected and separate service from the railroad transportation. Being a local service, which follows and is not connected with the transportation, it is a domestic and not interstate transaction.

And the carting is, at most, a "facility" of the commerce; and the charge for that service is not any part of interstate commerce, and an agreement respecting the same is not any regulation or restraint of that commerce, within the Sherman Act, as is held in the *Hopkins case,* 171 U. S., 578, 592-7.

But in the case at bar there is not the shadow of a ground, which existed in the cases cited, for connecting this matter of the cartage of fresh meats from the warehouses of defendants to the shops or houses or dealers or consumers, with any interstate commerce. As we have shown, it is to be here taken that the meats are sold in the warehouses of the defendants in broken packages. It is clear that the business is not shown by the bill to be interstate commerce. Clearly, defendants, who are engaged in private business, have the right to sell their meats for delivery only at their warehouses, and not at the shops or houses of their customers; and having that right, they

have a right by mutual agreement to make that the uniform rule in the conduct of their business. And so they have the right if the purchaser desires them to deliver the goods, to charge cartage for such delivery; and they have a right by mutual agreement to make that charge uniform.

It is obvious that nothing here charged has the direct, immediate or necessary effect to restrain interstate trade or commerce.

This paragraph of the bill shows (if it should be conceived to charge a violation of the Sherman act) to what extremes a paternal government might go in interfering and controlling the private affairs of its citizens. No government has ever before gone so far.

The Circuit Court recognized the force of our contention to the extent of qualifying the injunctional decree, so that nothing therein should be construed to prohibit defendants from agreeing upon charges for cartage and delivery and other incidents connected with local sales, "where such charges are not calculated to have any effect upon competition in the sale and delivery of meats." (Trans., 34.)

We maintain that the injunction should have been refused and the bill dismissed.

4. As to the charge in the tenth paragraph.

The tenth clause of the bill alleges that defendants have "all and each" engaged in and will continue arrangements and agreements with divers officers and agents of common carriers, whereby defendants were to receive and have received and will receive, "by means of rebates and other devices, unlawful rates" for the trans-

portation of live stock and meats, "much less than the lawful rates," and were to enjoy and have enjoyed and will enjoy said advantage to the exclusion of competitors and the general public. And it is charged that by force of the consequent inability of competitors to engage or continue in such commerce without loss, defendants have monopolized and will continue to monopolize and have attempted and will continue to attempt to monopolize such commerce in live stock and fresh meats.

We take it that this paragraph or count is intended to charge a violation of the second section of the Sherman Act. We beg to submit with respect to this charge:

(1) The bill does not present any facts as to the terms of the alleged agreements of defendants with carriers, or as to the rates received by defendants and others or as to the lawful rates established and published, from which it will appear that the conclusion of law—that the agreements are for "unlawful rates" or rates "much less than the lawful rates"—may be drawn. It merely asserts the conclusion. It is bad on that ground.

It names none of the carriers or the agents of carriers with whom such "arrangements and agreements" have been made, and gives no dates or facts with respect thereto. It alleges no facts to show that any competitor or would-be competitor has been refused like rates. It does not allege ignorance of these necessary facts as an excuse for not stating them, or even rest upon an allegation upon information and belief as to the general charge,—from which it must be assumed that the Government had knowledge of all the actual facts there were. It follows that this charge (as all the others), is too indefinite and general to call for answer.

(2) The acts of defendants alleged in this paragraph are not a monopolizing or an attempt to monopolize any part of the trade or commerce among the states, within the Sherman Act. It is nothing more as alleged than an attempt to purchase transportation at the lowest rates. An attempt by a merchant to purchase his goods from a seller in competition with other sellers and buyers, at the lowest possible price would be no less an attempt to monopolize than this. In either case, the effect, if any, is only an indirect and incidental one.

(3) There is nothing in the Sherman Act (under which alone this petition was filed), which forbids any defendant from accepting or obtaining such rates for the transportation of their own property as he might. That subject, so far as congress has seen fit to legislate thereon, is covered by the interstate commerce acts. This proceeding is not brought under that act.

But this bill does not allege any violation of the Interstate Commerce Act. That act only forbids discrimination in charges for services like and contemporaneous for like traffic and for transportation under substantially like circumstances and conditions. To determine whether there has been a violation thereof in a given case, all the circumstances and conditions that reasonably apply to the situation and affect the question must be considered. The power is given by the act in the first instance, to the Interstate Commerce Commission to hear and determine that question; and this is to be upon notice to the carriers, and a right to a hearing on their behalf; and the orders of the commission are to be enforced by the courts upon its application; and its conclusion is made *prima facie* evidence. The Act of February 19, 1903 (which was not passed until after this proceeding was com-

menced), does not authorize this proceeding. (Compiled Stat. Suppl., 1903, pp. 363-66.) The proceeding there authorized is against the carriers; and requires the facts to be alleged. Obviously, no case is here presented which conferred any jurisdiction on the Circuit Court to enquire into or redress any alleged violation of the interstate commerce acts, if this proceeding were referred to those acts.

Again, at the time of the alleged violations here, and when this proceeding was instituted, neither the Interstate Commerce Act, nor any other federal law, forbade a defendant to contract for such rates of transportation of his property as he could get. The later Act of February 19, 1903 (Comp. Stat. Supp., 1903, 363-64), was the first act aimed at shippers.

It is suggested that according to the contentions of counsel for the Government, the interstate commerce acts and the Sherman Act proceed from different and opposing economic theories. The policy of the Interstate Commerce Act is uniformity of transportation rates and not competition in such rates. On the other hand, according to counsel, the public policy declared by the Sherman Act is unrestricted competition. Unrestrained competition is the *bete noire* of one act and the fetish of the other.

Obviously, then, this paragraph ten cannot be sustained under the Sherman Act, on which it is based. The alleged rates which defendants are there charged with having secured, are the result of competition. The alleged "inability of competitors and would-be competitors to engage or continue in such commerce without ruinous loss," is the result of that competition, which, according to counsel's contention, the Sherman Act requires to be free from any restraint.

(4) The tenth paragraph strikingly illustrates the grounds of multifariousness and misjoinder presented by the demurrer, as will be shown later.

(5) The bill and decree as to this matter are subject to all the objections which have before been urged, that they do not determine a case; but impose upon the court the regulation of commerce and the control of the future conduct of defendants' business, without limit of time. And the injunction is without precedent or support in authority (*supra,* pp. 35-40).

5. The eleventh paragraph or count of the bill (Trans., 8-9.)

This paragraph in most general terms charges:

> "That the said defendants now are and for years past have been in combination and conspiracy with each other and with the railroad companies and others to complainant unknown, to obtain a monopoly of the supply and distribution of fresh meats throughout the United States and its territories, and shipments thereof to foreign countries. To that end, the defendants do and will artificially restrain such commerce and put in force abnormal, unreasonable and arbitrary regulations for the conduct of their own and each other's business. Affecting the same from the shipment of the live stock from the plains to the final distribution of the meats to the consumer, all to the manifest injury of the people of the United States and in defiance of law."

This paragraph is so plainly insufficient that it calls for no argument. It alleges only a legal conclusion, and contains nothing to put defendants to their answer. What has been said on this point, and on other points, with reference to other paragraphs applies here.

IV.

THE DECISIONS UNDER THE SHERMAN ACT OF 1890.

A consideration of the decisions under the Sherman Act will make clear the insufficiency of this bill. That act is so broad and general in its terms that there has been wide divergence of judicial opinion as to its construction and scope. Yet counsel for the Government here present allegations and charges as general and indefinite as the language of the act itself, and if the court can condemn citizens and regulate and interfere with their private business on such vague and general charges as these, then trade and commerce will be greatly restrained and prevented by an act which was intended to promote its freedom.

(1) Among the first cases which were brought by the Government under the Sherman Act in question, and in which decisions were reported, was a criminal prosecution of persons who were engaged in forming the combination known as the Distilling and Cattle Feeding Company. Indictments were found in the District Court for the District of Massachusetts, and the sufficiency of them arose before Judge Nelson in that court on a motion to quash, in *United States* v. *Greenhut* (50 Fed. Rep., 469); before Judge Ricks, in the Northern District of Ohio, on an application for a warrant to remove certain of the defendants in the same case, Corning and others (51 Fed. Rep., 205); before Judge Jackson (then Circuit Judge, but later Circuit Justice), on the application of Green and others, defendants in the same case, for a writ of habeas corpus (52 Fed., 104); and before Judge Lacombe in the Southern District of New York,

on the application of Terrell, another defendant, for a writ of habeas corpus (51 Fed. Rep., 213).

About the same time, in the case of *United States* v. *Nelson and others,* a combination of lumber dealers was brought under the same act before Judge Nelson, in the District Court of Minnesota, on demurrer to the counts of the indictment (52 Fed. Rep., 646).

The next case under the same act seems to have been the *Trans-Missouri case,* in the Circuit Court for the District of Kansas, which was by bill in equity on the part of the Government (53 Fed. Rep., 440). Then followed the *Deuber Watch Case Co. case,* a suit for damages, before Judge Coxe, in the Circuit Court for the Southern District of New York (55 Fed., 851), which was affirmed by the Circuit Court of Appeals (66 Fed., 637).

In each of the above cases there was a concurrence in judgment upon certain questions, which has not been disturbed or affected, but, so far as considered by this court, has, as we think, been approved by the decisions here. Among those points are these:

(1) That to make a case under the Sherman Act, the sufficiency of the pleading making the charge must be tested, not by the general recitals and averments thereof, but by the specific acts or particular facts which are alleged to have been done and committed by the defendants. (52 Fed., 111-12, per Jackson, Circuit Judge; 52 Fed. Rep., 646, per Nelson, J.; 51 Fed. Rep., 210, per Ricks, J. See also *Addyston case,* 175 U. S., 245.)

(2) That contracts by manufacturers and sellers like defendants here, by which prices of their products are fixed or maintained or made uniform, or their own private business regulated, are not, in themselves, contracts in restraint of trade or attempts to monopolize trade or commerce.

For instance, in the cases cited, certain persons, for the purpose of restraining trade and commerce in distillery products, as was alleged, combined together, and in the form of a corporation obtained control of seventy distilleries within the United States, by means of which they controlled the manufacture and sale of seventy-five per cent. of all the distillery products made and sold within the United States; and were thereby able to control and fix the prices at which they would sell such products to dealers, and at which such dealers should sell the same, and by said means intended to control the amount of distillery products manufactured and sold among the several states, and to control and fix the price at which the same should be sold, and to prevent the effect of free competition in price and to increase the price, and thereby exact great sums of money from citizens purchasing such products and to secure to themselves exclusively the trade and commerce in such products, and to restrain trade and commerce therein among the several states. And in pursuance of said purpose said persons, under the form of said company, did sell distillery products, and by reason of said combination and of their said control, *did fix the price* at which the purchasers should and did sell said spirits in inter-state commerce, and by this means controlled the amount of such products sold, and did fix the price at which they were sold and thereby prevented the effect of free competition on the usual price, and did increase the usual price. And also said persons agreed with other purchasers, dealers in such products, that such dealers should buy such products exclusively from such persons, and should sell the same at prices not less than those fixed by the agents of said sellers, and in consideration thereof said sellers agreed to pay to said dealers a rebate on

articles so by them purchased. All of this was fully set forth; yet this did not show a violation of the Sherman act.

The averments in that case, it will be observed, were of many more and more specific acts and facts to show a violation of the act in question, than is to be found in the bill here; and the effect of defendants' agreements in restraint of interstate trade and commerce, and their power and purpose thereby to control and restrain and monopolize the entire interstate trade and commerce in the article there in question, were a great deal more directly and fully averred there than is done in the bill of complaint here—where, in fact, the allegations are merely conclusions of law and fact, or mere "epithets."

Yet, it was held by Mr. Justice Jackson, *in re Greene*, above cited, that, "stripping the indictment of its verbiage,—its general recitals and conclusions of law,"—it charged no violation of the act in question; and that the acts and agreements averred did not amount to, or show, a contract or combination in restraint of trade, or an attempt to monopolize trade within said act. And this was, in effect, the ruling by Judges Nelson, Ricks and Lacombe, in the other cases, above cited, where the sufficiency of the same indictment came before them.

And the same was held by Judge Nelson, in *United States* v. *Nelson*, 52 Fed. Rep., 646, in the case of the agreement of the lumber dealers.

Under the decisions, above mentioned, it is clear that the demurrers to the bill here must be sustained. Upon all the questions which are here presented the rulings in those cases, disclose a striking unanimity. The strength of that concurrence of judgment upon those questions, has not been in any way impeached, but so far as the

same questions have been fairly presented in the cases there reviewed, has been sustained by the decisions of this court.

(2) The case at bar will be seen to fall outside the test laid down by this court, that the restraint upon interstate commerce must be direct and immediate in order to come within the act.

The cases in the Supreme Court, in which the Sherman Act has been held to apply and the contracts or combinations complained of held to be in violation thereof, are *United States* v. *Trans-Missouri Assn.*, 166 U. S., 290; *United States* v. *Joint Traffic Assn.*, 171 *id.*, 505; *Addyston Pipe Co.* v. *United States*, 175 *id.*, 211; *Montague* v. *Lowry*, 193 *id.*, 38, and *Northern Sec. Co.* v. *United States*, *id.*, 197. Those cases are each so distinct in material facts from the case at bar that the decision thereof cannot apply to govern this case. In each of those cases all the material facts and circumstances were presented to the court by pleading and proof, including the terms and provisions of express and specific contracts and acts of defendants in carrying out the same, by which it clearly appeared that interstate trade and commerce was to be and was directly and unreasonably restrained.

In each of the cases, the jurisdiction and judgment of the court was invoked to adjudge a particular contract or contracts to be illegal and to enjoin their performance. But in none of them did the Government, upon the general charge that the defendants had combined and were combining and would combine to restrain interstate commerce, ask the court to enjoin them generally from doing so in violation of the Sherman act, and thus assume the supervision of all their future business.

In each of those cases, as indicated by Mr. Justice Brewer in the *Northern Securities case* (193 U. S., 361), the contracts presented were unreasonable restraints of trade within the common law definition or rule.

The cases in which the Sherman Act was held by this court not to apply to sustain the case of the Government are *United States* v. *E. C. Knight & Co.*, 156 U. S., 1; *Hopkins* v. *Same*, 171 *id.*, 578, and *Anderson* v. *Same*, *id.*, 604.

We beg to be permitted to consider these cases here briefly. In the *Knight case* (156 U. S., 16), it was held that a combination to control the manufacture and production and the price of refined sugar—an article of necessity—was not a combination to restrain interstate trade or commerce within the provisions of this act of Congress. It was said in the opinion of the court that the restraint of interstate trade which contracts or combinations to raise or lower prices would tend to effect would be an indirect result. Also, that congress did not attempt by the Sherman Act to limit the rights of corporations created by the States or citizens of the States, to regulate or prescribe the prices at which their property or products should be sold. This ruling was necessary to the decision, because it was there alleged and was an evident fact that the American Refining Company made the contracts of purchase of the four defendants in question in order to obtain complete control of the production and price of refined sugar in the United States, and did control such price. It appeared that the American Sugar Refining Company there controlled refineries in which about 90 per cent. of the sugar refined and sold in the United States was produced.

The form of combination there (the organization of a single corporation or owner for the purpose of controlling the production and trade and price of an article of commerce) tended directly to an effective and complete monopoly, and was one which was clearly offensive to the principles of public policy against monopolies, which are a part of the system of jurisprudence of the American States. (*Richardson & Buhl,* 77 Mich., 632; *Distilling Co.* v. *People,* 156 Ill., 448, 486; *Harding* v. *American Glucose Co.,* 182 Ill., 551, 615.) On the other hand, the alleged agreements of defendants here are not subject to any such condemnation. (*Bohn Mfg. Co.* v. *Hollis,* 54 Minn., 223; *Central Shade Roller Co.* v. *Cushman,* 143 Mass., 353; *Comm.* v. *Hunt,* 4 Metc., 111; *Matthews* v. *Associated Press,* 136 N. Y., 333; *Continental Ins. Co.* v. *Board of Underwriters,* 67 Fed., 310, per McKenna, C. J., and cases cited.) The effect of the combination in the *Knight case,* upon interstate trade, was more direct, at least no more indirect, than the alleged combinations of defendants here charged. It was more direct than the case at bar, because, as last stated, it tended directly to a monopoly in single hands of the production, price and trade of an article of general use throughout the United States, which was produced in greater part for the purpose of interstate trade than for domestic trade.

In other respects the combination in the *Knight case* was no more indirect than that charged in the case at bar. In this case, as in that, the alleged combination affected the production and price of a product which was not yet and might or might not become, according to the future action of the owner, the subject of interstate commerce.

In *Hopkins* v. *United States,* 171 U. S., 578, the defendants, whose contract of association was the basis of the suit under the Sherman Act, were engaged as commission merchants at the Kansas City stock yards, in the business of buying and selling live stock, which was consigned to them for the purpose of sale, and the rendering of an account of the proceeds and remitting the proceeds arising therefrom. It was there shown that the larger proportion of the purchases and sales was of live stock sent into that State from other States or from the Territories. It appeared that by their mutual agreements defendants fixed and maintained the rates of commission to be charged for handling and selling such cattle; and in order to secure the business sent their agents into other States to the owners of cattle, to solicit the business from them, and also loaned money to the cattle owners and took back mortgages upon the cattle as security for the loans and made advances of a portion of the purchase price of the cattle to be sold, by means of the payment of drafts drawn upon them by the shippers of the cattle in the other States at the time of the shipment. The court said:

> "The contract condemned by the statute is one whose direct and immediate effect is a restraint upon that kind of trade or commerce which is interstate.
> * * *
>
> "To treat as condemned by the act all agreements under which, as a result, the cost of conducting an interstate commerce business may be increased, would enlarge the application of the act far beyond the fair meaning of the language used. There must be some direct and immediate effect upon interstate commerce in order to come within the act."

It appeared that one of the articles of the agreement of the association of the defendants prohibited the em-

ployment of any such solicitor except upon a stipulated salary not contingent upon the commissions earned, and provided that not more than three solicitors should be employed at one time by the commission firm or corporation, resident or non-resident, of Kansas City. With respect to the validity of such an agreement, the court says:

> "It is also to be remarked that the effect of the agreement as to the number of solicitors to be employed by defendants can only be remote and indirect upon interstate commerce. * * * We say nothing against the constitutional rights of each one of the defendants and each person doing business at the Kansas City stock yards to send into distant States and Territories as many solicitors as the business of each will warrant. This original right is not denied or questioned. *But cannot the citizen, for what he thinks good reason, contract to curtail that right? To say that a State would not have the right to prohibit a defendant from employing as many solicitors as he might choose, proves nothing in regard to the right of individuals to agree upon that subject in a way which they may think the most conducive to their own interests. What a State may do is one thing, and what the parties may contract voluntarily to do among themselves is quite another thing.*
>
> "The liberty of contract as referred to in *Allgeyer* v. *Louisiana*, 165 U. S., 578, is the liberty of the individual to be free, under certain circumstances, from the restraint of legislative control with regard to all his contracts, but the case has no reference to the right of individuals to sometimes enter into those voluntary contracts, by which their rights and duties may properly be measured and defined and in many cases greatly restrained and limited."

By "the liberty of the individual to be free from legislative control with regard to all his contracts," the court refers to the right protected by the Fifth Amendment. Under that guarantee he cannot be any more denied the

right to contract for the limitation of his acts, than to make any other contract.

That a valid contract in the interest of their own private business may be made, by private dealers engaged in interstate commerce, with each other, by which their purchases and sales of articles of interstate commerce are restrained and lessened, and that such contracts are not forbidden by the Sherman Act in question, is more clearly shown by the decision of this court in *Anderson* v. *United States, supra,* which is most in point here of any case which has been decided under the act in question.

In that case the court for the purposes of the decision of the other question assumed, without deciding, that the defendants were engaged in interstate commerce and that their agreement in question was with respect to interstate commerce. (171 U. S., 615.)

The agreement of the defendants there in question (who were what was called "yard traders" or "speculators" at the Kansas City stock yards) was contained in the articles of association of "The Traders' Live Stock Exchange" and the by-laws thereof, which were their mutual agreements with each other. One of the by-laws was that said exchange would not "recognize" any "yard trader" unless he was a member of said exchange. This was shown to be and was treated as a mutual agreement *not to deal with certain persons, or with persons who also dealt with certain of their competitors.* And it was alleged and shown that the purpose of these rules was (and they were so carried out by the the defendants) that the members of the association would not purchase any cattle from any commission merchant who should sell cattle to or purchase cattle from any "yard trader" who was not "recognized," *i. e.,* was not a member of said

exchange, and by notifying commission merchants of such refusal, thus compel them not to sell any cattle to any such yard trader who was not a member of said exchange, by boycotting any commission firm who should make sales of cattle to yard traders who were not members of said exchange. As expressed by the court, with yard traders who are not members of the exchange, "the defendants will not compete, nor will they buy of the commission men if the latter continue to sell cattle to such traders." (P. 614.)

The court held this contract or combination to be valid and not to be in restraint of trade, and said of it:

> "*The agreement* as evidenced by the by-laws *is not one in restraint of that trade, nor is there any combination to monopolize or attempt to monopolize such trade within the meaning of the act.*"

The grounds of this decision were that the court found that these rules and agreement were such as private persons, in the exercise of their right of private contract with respect to their own business dealings, might lawfully make with each other, although they were competitors in business with each other and with the other yard traders so excluded from their dealings.

The court further holds (p. 616) that as the acknowledged powers of a State may be exerted and applied in such a manner as to affect foreign or interstate commerce without being intended to operate as commercial regulations (as held in *Smith* v. *Alabama*, 124 U. S., 465, 472)—so, notwithstanding the Sherman Act, valid agreements may be entered into between persons engaged in the same business for the purpose of properly and reasonably *regulating the conduct of their business among themselves and with the public*, although such agree-

ments may affect (and restrain, as was done there) foreign or interstate commerce. And the court then says:

> "If an agreement of that nature, while apt and proper for the purpose thus intended, should possibly, though only indirectly and unintentionally, affect interstate trade or commerce, in that event we think the agreement could be good."

The *Trans-Missouri case* (116 U. S., 290) and the *Joint Traffic case* (171 *id.*, 505) were decided by a divided court. This court, by a bare majority, reversed the decisions of the Circuit Court of Appeals and of the Circuit Court. So that it may be said that judicial opinion in those cases was fairly balanced; and it is a just conclusion that those cases were close to the line which separates cases which are within from those which are without the application of the Sherman Act.

There was before the court the distinct provisions of explicit agreements, each of which concerned all the competitive traffic in certain territory. Their purpose was plain—to control and regulate and monopolize such traffic, and prescribe and maintain rates for freight transportation on competitive traffic in that entire territory. For instance, in the *Joint Traffic case,* the court said:

> "By this agreement, the board of managers is in substance and as a result thereof placed in control of the business and rates of transportation, and its duty is to see to it that each company charges the rates agreed upon and receives its equitable proportion of the traffic." (P. 565.)

And it was found by the court that the natural, direct and necessary effect of the various provisions of the agreement there in question was to prevent any competition whatever between the parties to it, in the public business of the railroads, for the whole time of its exist-

ence, and was probably as effective in that way as would be a provision in the agreement prohibiting, in terms, any competition whatever. (*Id.*, 565.)

It was urged upon the court in the *Joint Traffic case*, that if the Act of July 2, 1890, is construed to make criminal all contracts in restraint of trade in any degree, although such contracts were not necessarily prejudicial to the welfare or security of society (as it was conceived the language of the opinion in the *Trans-Missouri case* held), then such act infringed the guaranties of the fifth amendment to the Constitution, and instances of various kinds of contract which are rendered illegal by such construction, but which are protected by the Constitution, were given by counsel. The court did not deny that the act, if so construed, would be unconstitutional, but in effect held that the act was not to be construed to forbid such contracts. And the court observed that no contract of the nature there instanced was then before the court, and that none such was forbidden by the act.

In each of the traffic cases, the agreements were between corporations engaged in the public business of common carriers, and they were held to be in illegal restraint of trade and against public policy *at the common law* (166 U. S., 333, *et seq.*), following *Gibbs* v. *Baltimore Gas Co.*, 130 U. S., 396, 408; *Chicago Gas Co.* v. *Peoples Gas Co.*, 121 Ill. 530, and other cases. The decision of the above cases was then reached without holding that *every* or *any* contract between private sellers of an article by which the price thereof is to fixed or maintained in interstate trade, is in restraint of such trade within the meaning of said act; or even that every contract of such private dealers which restrains trade is within the prohibition of said act. The contrary was held in the *Hopkins* and *Anderson cases*.

It is plain that the rule of decision, therefore, which was applied by the Supreme Court to these contracts of public common carriers, does not apply to the business and facts alleged in the bill in the case at bar.

In the *Addyston case* (175 U. S., 211), tne full terms of the agreement of combination between the defendants was before the court. Those companies were located in different States and were engaged in the manufacture, sale and transportation of iron pipe. The record shows that the contracts for furnishing pipe were let upon competitive bidding, for the most part by municipalities, and that the agreement in question was an *agreement among bidders*, which plainly destroyed all competition between the defendant companies by dividing up the business of the cities and in the territory covered by them. It was made for that purpose and undertook to divide up the business and give to one company the business of certain cities and to another the business of other cities, and so restrained the trade in each city of all the parties, except the one company to whom the city was allotted. This agreement among companies who were seeking contracts by bidding therefor at public lettings to the lowest bidder was, therefore, plainly prejudicial to the public interests and against public policy, upon common law principles, according to the authorities. (*Hyer* v. *Richmond Traction Co.* (Cir. Ct. App., 4th Cir.), 80 Fed. R. 839; *Gibbs* v. *Smith*, 115 Mass., 592; *Hunter* v. *Pfeiffer*, 108 Ind., 197; *Jones* v. *Caswell*, 3 Johns. Cas., 29; *King* v. *Winans*, 71 N. C., 469.)

It was also found and held in the *Addyston case* that the agreement or combination was not one which simply secured for its members fair and reasonable prices for the article dealt in by them, but that the facts showed conclu-

sively that the effect of the combination was to enhance prices beyond a sum which was reasonable. (*Id.*, 235-8)

The *Addyston case* is in vital respects unlike the case at bar and its decision is not applicable to this case.

The *Montague case* (193 U. S., 38) is equally distinguishable. The tile association agreement in question there (section 7), expressly provided that no dealer and active member thereof should purchase from any manufacturer of tiles not a member of the association, nor sell for prices less than list prices adopted by the association to any person not a member , and no person in the business in San Francisco within a radius of 200 miles was qualified for membership who carried less than $3,000 worth of stock. By reason thereof, the plaintiffs, who had established a profitable business in San Francisco, but who did not carry $3,000 worth of stock and could not become members of the association, were unable to procure tiles from the manufacturers (who refused to sell to them at any price because they were not members), or from dealers in San Francisco, except at a price fixed by the association, fifty per cent. over the price at which members could purchase. Here was a direct restraint of trade and attempt to create a monopoly by a direct and wrongful interference by this association with the business of other dealers. Nothing of that kind is alleged in the case at bar.

It is permissible here to invoke the rule that the language in the opinions in some of the cases in which the Sherman Act was held applicable, is to be taken only with their own facts; and the case there presented for decision upon those facts was not at all the case at bar here.

In *Quinn* v. *Leathem*, in the House of Lords, 85 Law Times Reports, 289, and Appeal Cases, 495, Lord Chancellor HALSBURY said:

> "There are two observations of a general character which I wish to make; and one is to repeat what I have very often said before—that every judgment must be read as applicable to the particular facts proved or assumed to be proved. * * * The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it."

In *Cohens* v. *Virginia* (6 Wheat., 399), the court was much pressed with some portion of its opinion in *Marbury* v. *Madison*, and Mr. Chief Justice MARSHALL said:

> "It is a maxim not to be disregarded, that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented."

And in *Carroll* v. *Carroll's Lessee*, 16 How., 287, Mr. Justice Curtis quoted this and stated the rule to be that "any opinion given here or elsewhere cannot be relied on as a binding authority, unless the case called for its expression."

Observing that rule, it will be found that the decisions of this court involving the Sherman Act, which are here in point, are those in which it has been held that that act was not violated.

It will be observed that in no previous case has the Government successfully invoked the extraordinary jurisdiction of the court to interfere with and enjoin the conduct by defendants of their private business upon such general charges and epithets as are presented in this bill.

The character of defendant's acts and contracts alleged in the bill of complaint is not affected by the general charges of illegal purpose or epithets contained in the bill. Counsel cannot make these acts and contracts illegal by charging them to be illegal. The question is, as said by Mr. Justice Day in the *Chesapeake & Ohio case* (115 Fed. R., 610), after considering the decision of this court,—is the ***necessary effect*** of these alleged acts and contracts ***directly and immediately to restrain*** trade or commerce among the states, or to monopolize such trade or commerce. And this necessary effect must be shown by the facts alleged—the contracts or acts themselves of the defendants, which are set forth in the bill of complaint, and not by the pleader's characterization of them.

Again, we repeat that never before has a court been asked, upon a bill containing such general charges of violation and of intention in the future to violate the Sherman act, to enjoin defendants from violating the law and assume the supervision of the future conduct of their private business. If that is authorized by the Act of July 2, 1890, it is suggested that it is an act designed to restrain and hamper, and not to promote, the freedom of trade.

Now, all the alleged acts and agreements of the defendants, which are (so meagerly) charged in the bill of complaint are, so far as they are shown by facts alleged in said bill are concerned, entirely consistent with the utmost freedom of trade. There is not a single fact alleged which tends to show any sort of interference by defendants with the business or freedom of trade or conduct of any other person,—not so much as there was in the *Anderson case*. There is nothing in the bill here tending to show any contract or combination to restrict the trade of the defendants themselves. That was not so in the ***Anderson case.***

V.

THE ACT OF JULY 2, 1890, MUST BE CONSTRUED IN THE LIGHT OF THE SETTLED PRINCIPLES OF THE COMMON LAW RESPECTING PERSONAL RIGHTS OF PROPERTY AND OF CONTRACT.

It has been supposed that we are not to look to the common law for light or aid in the construction of the Sherman Act; and perhaps color for this position is to be found in the language of some of the majority opinions of this court in cases which have arisen under that act. We maintain that this language was unnecessary to the decision as pointed by Mr. Justice Brewer in the *Northern Securities case*, and is against settled principles of construction of federal statutes. As we have shown, in each of the cases where the agreements of the defendants were condemned by this court as violations of the Sherman Act, those agreements were clearly against principles of public policy long and firmly settled at the common law and were obviously injurious to the public interest.

It is settled that the Constitution itself, as well as statutes passed in pursuance thereof, are to be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the Constitution. *United States* v. *Wong Kim Ark*, 169 U. S., 649; *Moore* v. *United States*, 91 U. S., 270, 274; *Minor* v. *Happersett*, 21 Wall., 162; *Ex parte Wilson*, 114 U. S., 417–422; *Boyd* v. *United States*, 116 U. S., 616, 624, 625; *Smith* v. *Alabama*, 124 U. S., 465.

This principle is more clearly called for when the commerce clause of the Constitution or statutes passed under it are claimed to interfere with personal rights such as the right of private contract. It is obvious that the sanctions of the common law, which our ancestors claimed and secured with respect to what were recognized as the absolute rights of individuals, viz.: the right of personal security, the right of personal liberty and the right to acquire and enjoy property, including the right and freedom of private contract), and which were regarded as natural, inherent and inalienable, and were vigorously asserted by the people of the American colonies, are to be resorted to in construing the provisions of the Constitution adopted by them, which, like the fifth amendment, were intended to secure those guarantees. The powers granted to the federal government, including the power to regulate commerce, were powers existing in the States.

Gibbons v. *Ogden*, 9 Wheaton, 1,227.

These powers were grounded upon the principles of Magna Charta and the Bill of Rights. As held by Chief Justice Marshall in *Gibbons* v. *Ogden* (p. 211), the right of the citizens to carry on commerce between State and State was not conferred by the Constitution, but the Constitution found it an existing right and gave to Congress the power to regulate it. And the declaration of the Chief Justice in that case (and repeated in the *Addyston Pipe case*, 175 U. S., 228), that the power granted to Congress to regulate commerce was complete in itself and acknowledged no limitations other than are prescribed in the Constitution, laid down no principle of absolutism in govern-

ment. In fact, the court was not there speaking of this power over the rights of persons, but of the limitation of the powers of the Federal government, as between that Government and the States.

But the Constitution itself preserves as against federal power all the personal rights which were embodied in the fundamental principles of the State governments. The ninth amendment which is part of the bill of rights, significantly provides that:

> "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people."

The rights so retained are those secured under our common law system of government and laws. And the guarantees of the fifth amendment are a limitation upon legislative as well as executive power. And it has been held that the United States cannot, any more than a State, interfere with private rights, except for legitimate governmental purposes, and are, equally with the States, prohibited from depriving persons or corporations of property without due process of law. *Sinking Fund cases*, 99 U. S., 700, 718–19. The right of contract is included within the property rights so protected. *Allgeyer* v. *Louisiana*, 165 U. S., 578, 591. The exercise of the power of Congress or of the legislature of a State to impose limitations upon the right of contract is no more than that same police power, which may be equally exercised by the States within their province, to limit the enjoyment by the citizen of his property, so far as the public welfare requires. But the exercise of this power is limited and not absolute; is subject to judicial review, and

cannot be put forward as an excuse for oppressive and unjust legislation.

Holden v. *Hardy*, 169 U. S., 391–2.
Lawton v. *Steele*, 152 U. S., 133, 137.

In construing the restrictions in the fifth amendment, which protects the personal rights of the citizen, and which were taken from Magna Charta, regard is to be had to those rights as they have always existed under our system of government and jurisprudence, and so in interpretating its guaranty that the citizen shall not be deprived of life, liberty or property without due process of law, it was held in *Murray's Lessee* v. *Hoboken*, 18 How., 272, 276–7, that in determining whether there was due process of law under an act of Congress, "we must look to those settled authorities and modes of proceeding existing in the common or statute law of England before the emigration of our ancestors and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country." To the same effect is *Holden* v. *Hardy*, 169 U. S., 366, 390. And so it was held that in construing the provisions of the Constitution providing for trial by jury, resort should be had to the common law, and that the jury referred to was the common law jury of twelve.

Callan v. *Watson*, 127 U. S., 540.
Thompson v. *Utah*, 170 U. S., 343.

In construing the acts of Congress as in determining their validity, it is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis*.

Boyd v. *United States*, 116 U. S., 616–635.

The significance of all this is apparent here, where, in order to sustain this bill of complaint, and decree, the power of Congress to *regulate* commerce, and the act of Congress passed in pursuance of it to promote the freedom of that commerce, must be given a meaning and scope which they have not before received, and under which the conduct of their interstate trade and commerce by these defendants, (private persons and corporations,) will be for the future regulated, not by specific provisions of law, but by the Federal court of equity, and the owners of the business will enter into all their contracts with the consciousness and risk that they are in contempt of the court if the presiding judge should deem that the "purpose or effect" of any such contract will be a restraint of that trade.

VI.

THE BILL OF COMPLAINT IS MULTIFARIOUS. AND IT IS BAD FOR MISJOINDER OF CAUSES AND OF PARTIES.

The bill of complaint contains more than five distinct and unconnected offenses. The alleged violation of the Sherman Act in the sixth paragraph, is entirely unconnected with those in the seventh, eighth, ninth and tenth paragraphs, and each of these alleged offenses is unconnected with any other.

The tenth paragraph itself contains as many distinct and unconnected offenses as there are defendants. It alleges that each of the defendants has engaged in arrangements and agreements with common carriers to receive and has received and will continue to receive unlawful rates for transportation. And under the allegations of that paragraph, it is to be taken that

the respective agreements and arrangements there charged are several and separate arrangements by each of the packing companies or defendants, made for its or his own business.

It would, as we conceive, be difficult to prepare a bill of complaint under the Sherman Act which would be multifarious or in which there would be a misjoinder or causes of action and parties, if this bill is free from those vices.

VII.

THE BILL OF COMPLAINT DOES NOT SET FORTH SUFFICIENT DEFINITE OR SPECIFIC FACTS TO SHOW ANY CAUSE OF ACTION OR TO REQUIRE ANSWER, BUT IS TOO GENERAL AND INDEFINITE.

This point of demurrer has been necessarily presented in the previous discussion of specific paragraphs of the bill. (*Supra*, pp. 17, 29-34.) What is there urged is to be taken as applicable as well to the demurrer to the whole bill as to the demurrers to specific parts. It has been shown that as the relief in equity under the Sherman Act is to enjoin violations of the act, which are the commission of crimes, it is necessary that the facts alleged in the bill show a violation of the act.

It is to the substantive facts alleged in the bill that we must alone look for the case presented, and not to epithets or adjectives or adverbs which may be added to qualify them. (*Magmae* v. *Thompson*, 2 Wall. Jr., 209; *Price* v. *Coleman*, 21 Fed. Rep., 357; *Moore* v. *Green*, 19 How., 69; *Van Weel* v. *Winston*, 115 U. S., 237-38; *St. Louis, &c., Ry. Co.* v. *Johnston*, 133 U. S., 577; *Wood* v. *Amory*, 105 N. Y., 278; *Hill* v. *Dyerville Co.*, 116 Cal., 135.

VIII.

THE DEMURRERS TO SO MUCH OF THE BILL AS PRAYS FOR ANSWER UNDER OATH, AND SO MUCH THEREOF AS PRAYS FOR DISCOVERY OF BOOKS, PAPERS, DOCUMENTS, ETC., ARE WELL TAKEN.

These points are clearly settled in our favor by the authorities. In *United States* v. *Saline Bank*, 1 Pet., 100, Chief Justice MARSHALL said:

> "This is a bill in equity for a discovery and relief. * * * The rule clearly is that a party is not bound to make any discovery, which would expose him to penalties, and this case falls within it."

Lord Redesdale lays down the rule as follows in his work on Equity Pleading:

> "It is a general rule that no one is bound to answer so as to subject himself to punishment in whatever manner that punishment may arise or whatever may be the nature of the punishment. If, therefore, the bill requires an answer which may subject the defendant to any pains or penalties he may demur to so much of the bill. As if a bill charges anything which, if confessed by the answer, would subject the defendant to any criminal prosecution, or to any particular penalties, as a usurious contract, maintenance, champerty, simony. And in such cases if the defendant is not obliged to answer the facts he need not answer the circumstances, though they have not such an immediate tendency to criminate."
>
> Mitford & Tyler's Equity Pleadings, 289.

And it is held that such a demurrer will not be regarded as any admission of the truth of the charge. *Id.*, note 4, citing 16 Ves., 69.

In *Livingston* v. *Tompkins*, 4 Johns. Ch., 415, 432, Chancellor Kent said:

> "There are numerous cases establishing the rule that no one is bound to answer so as to subject himself, either directly or eventually, to a forfeiture or penalty, or anything in the nature of a forfeiture or penalty."

The fourth and fifth amendments to the Constitution provide that protection.

The Sherman Act of July 2, 1890, under which this bill is brought, makes violations thereof criminal and punishable as misdemeanors. It also provides for the forfeiture of property.

This rule is, under the authorities, applied as well to the requirement of an answer, as to the requirement of a discovery in any other way, as by the production of books, etc., as here prayed.

1. *The answer under oath to the bill of complaint charging violations of this act, cannot, therefore, be required.*

The prayer for answer under oath is the prayer for a compulsory answer; and in case the defendant fails to answer he is in contempt of court, and his answer may be compelled by imprisonment or other punishment for contempt of court until such answer shall be given. In other words, in proper cases, the answer is compelled by the same methods as may be used to compel the answer of a witness. The principles governing each are the same; and this is plainly forbidden as well with respect to the requirement of an answer under oath in the bill as to the examination of a witness, by the fifth amendment, which it is settled is to be construed liberally.

Counselman v. *Hitchcock*, 142 U. S., 547.

2. *The demurrer to the prayer for discovery of books, papers, etc., is well taken.*

The petition prays discovery of the books, papers, documents, etc., whatsoever of defendants relating in any manner, directly or indirectly, to the purchase or shipment of live stock by them or their agents, or of the sale or shipment or delivery of fresh meats by them or their agents.

Such a prayer is clearly impertinent. It is not limited to any of the purposes of this suit.

Again it clearly violates the fourth and fifth amendments to the Constitution. This is settled by the authorities above cited. See also opinion of Lord *Camden* in *Entick* v. *Carrington*, 19 Howell's State Trials, 1,029; S. C., 2 Wils., 275; *Huckle* v. *Money*, 2 Wilson, 206, 207. The power to search for private papers had for a long time been exercised and maintained during the arbitrary reign of the Stuarts, and afterwards, and it was claimed by the secretary of state in *Entick* v. *Carrington*, but denied as "unsupported by one single citation from any law book extant."

The fourth amendment requires a showing of probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the persons or things to be seized. There is no compliance with that requirement.

In re Pacific Ry. Commn., 32 Fed. Rep., 241, 250, Mr. Justice FIELD said, and this is quoted with approval by the Supreme Court in *Interstate Com. Comm.* v. *Brimson*, 154 U. S., 479:

> "Of all the rights of the citizen, few are of greater importance or more essential to his peace

> and happiness than the right of personal security, and that involves not merely protection of his person from assault, but exemption of his private affairs, books and papers from the inspection and scrutiny of others. Without the enjoyment of this right all others would lose half their value."

The Sherman Act extends no immunity from prosecution or forfeiture of estate, and the immunity extended by the Interstate Commerce Act as amended by the act of February 11, 1893 (referred to in *Brown* v. *Walker*, 161 U. S., 591, and *Interstate Commerce Comm.* v. *Baird*, 194 *id.*, 45), does not cover this case. The provisions in section 3 of the act of February 19, 1903, which was passed since this proceeding, was commenced, does not apply to a proceeding brought under the Sherman Act. (U. S. Comp. Stat. Suppl., 1903, pp. 365–66.)

It is submitted that these demurrers should have been sustained and the bill dismissed, and that the decree should be reversed with that direction.

JOHN S. MILLER and
MERRITT STARR,
For Defendants.